SECRETARY OF LABOR, Complainant, v. YENTER COMPANIES, Respondent.	OSHRC DOCKET NO. 98-2083

APPEARANCES:

For the Complainant:
Kim Pritchard Flores, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri.
For the Respondent:
Rodney L. Smith, Esq., Freeborn & Peters, Denver, Colorado

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under §10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, et seq. (the Act) to review a citation issued by the Secretary of Labor pursuant to §9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to §10(a) of the Act.

On November 4, 1998, Yenter Companies, was issued one Serious citation alleging a single violation of the standard set forth at 29 CFR 1926.651(j)(2) as amended.

A penalty in the amount of $1,575 was proposed by the Secretary.

Respondent filed a timely notice of contest and this matter was assigned for E-Z Trial Proceedings pursuant to Commission Rule 29 CFR 2200.200 *et seq.* A hearing was conducted on May 11, 1999 and, in accordance with Commission Rule 209(f), a decision was issued from the bench affirming the citation as a serious violation and assessing a penalty in the amount of $100.00. Findings of fact and conclusions of law as required by Commission Rule 90(a) are set forth at transcript pages 100 to 106 attached hereto.

All findings of fact relevant and necessary to a determination of the contested issues have been

made as required by Fed. R. Civ. P. 52(a). Respondent admits jurisdiction. All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Serious Citation No. 1, Item No. 1, alleging a violation of 29 CFR 1926.651(j)(2) is affirmed and a penalty in the amount of $100.00 is ASSESSED.

Robert A. Yetman
Judge, OSHRC

Date:

D E C I S I O N

THE COURT: Please be seated. I have had an opportunity to review the evidence and I am ready to rule from the bench.

In this case, jurisdiction has been admitted. Respondent is engaged in business affecting commerce. It is a construction firm and, on the day of the inspection, was engaged in work activities related to the relocation of existing historical buildings.

As a result of an inspection by OSHA, Respondent was issued a citation listing one serious violation of 29 C.F.R. §1926.651(j)(2) (as amended).. And that standard reads as follows: "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 two feet 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." A penalty in the amount of $1,575.00 was originally proposed for the violation. The Secretary now proposes a penalty in the amount of $1,417.00.

In order to prove the violation, the Secretary must establish the following: One, that the cited standard applies to the work activity; two, that the employer failed to comply with the terms of the standard; three, that the Respondent's employees had access to the hazardous condition, and, four, that Respondent knew or with the exercise of reasonable diligence could have known of the violation. I cite *Astra Pharmaceuticals*, 681 F.2d 69. It's a First Circuit case, 1982, see also *Gary Concrete Products*, 15 BNA 1051.

The Secretary must prove the violation by a preponderance of the evidence; that is, that the conclusion is more probably true than not based upon the evidence. *Ultimate Distribution Systems*, 10 BNA 1596, 1982. It's not a very stringent test that has to be met by the Secretary. The facts in this case are that the compliance officer came on the worksite and observed a wall of an excavation approximately 15 feet high. The photograph in evidence, Exhibit C-3, shows the wall and two individuals standing near the excavation wall. The names of the employees have not been established; however, employees interviewed during the investigation stated that they were in the excavation during their work activity. The photographs and the video show rocks

and other materials at the top of the excavation wall. The compliance officer testified that the debris from the excavation was placed within two feet of the top of the excavation.

As I indicated previously, in response to the motion to dismiss, the Secretary has provided a minimum, but sufficient, evidence to satisfy the burden to establish a *prima facie* case that excavated or other materials were stored within two feet of the edge of the excavation. Moreover, the compliance officer stated that the rocks presented hazards of falling into the excavation. Further, Respondent's foreman was present and knew or should have been aware of the condition. This is the evidence presented by the compliance officer. The Respondent has not rebutted this evidence; thus, I'm compelled to find that the standard was violated as alleged.

The defense raised by the Respondent is that no employees were exposed to the violation. It is not necessary to establish actual exposure of employees to the hazard. To prove a violation, the evidence need only show that employees in the course of their duties will be or have been in the zone of danger. In those cases where there's no actual exposure, it is sufficient that the Secretary establishes that it is reasonably predictable that employees have access to the hazardous conditions. I cite *Phoenix Roofing, Inc*., a Review Commission case 1993-95 CCH in paragraph 30, 699. The evidence in support of employee exposure consists of the compliance officer's observations and photographs depicting, at least in one instance, two individuals near the excavation wall. The evidence establishes that Respondent's employees were constructing a wall within five feet of the bottom of the excavation wall. It is inferred that employees were required to move to various locations along the excavation wall to perform their work activity. Thus, it is concluded that the Secretary has provided sufficient evidence for employee exposure to support a *prima facie* case.

Notwithstanding my denial of Respondent's motion to dismiss, Respondent has declined to present a case in chief. This is a legitimate, but a risky defense tactic. As stated by the First Circuit Court of Appeals in *Astra Pharmaceuticals,* 681 F.2d at 74:

> While the Secretary had the burden of proving its case by substantial evidence, what constitutes substantial evidence varies with the circumstances. The "evidence a reasonable mind might accept as adequate to support a conclusion" is surely less in a case like this is where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight.

See also *Noranda Aluminum, Inc. v. OSHA,* 593 F.2d 811. It's an Eighth Circuit case, 1979, "decision to leave Secretary's case unrebutted, is a legitimate but always dangerous defense tactic in litigation." I cite also *Stephensen Enterprises, Inc. v. Marshall,* 578 F.2d 1021, a Fifth Circuit case, "thus thin as the underlying evidence was, we find it sufficient in these circumstances." That finding is applicable in this case. Although the Secretary has provided a minimum of evidence in support of the violation, it is, in my view, sufficient to provide a *prima facie* case. I have nothing from Respondent, however, to rebut that *prima facie* case.

Having found a violation, my next consideration is whether it's a serious violation. The evidence from the compliance officer is that falling rocks can, if any employee is struck, result in a serious injury. Death, however, is not apparently a consideration in this case. Based upon the evidence provided by the compliance officer, I find that this is a serious violation.

With respect to the penalty, the penalty is based upon a number of factors that were discussed by the compliance officer, primarily the gravity of the violation. That consists of three items; the severity of the resulting injury from the hazardous condition, the probability of injury, and the extent of the violation. I find that all three factors provide a low incidence or probability. So the severity of the resulting injury, I find to be low, the probability of an injury is low, and the extent of a violation is low as well. The compliance officer provided a 10 percent
reduction for size, and, while he was on the stand, he also gave reduction credit for history. Based upon all the evidence in this case, I find that a penalty in the amount of $100.00 is appropriate for the violation. That concludes this hearing. Let's go off the record.

(Whereupon, the proceedings were recessed at 1:50 p.m.)