



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
 1120 20th Street, N.W., Ninth Floor  
 Washington, DC 20036-3419

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SECRETARY OF LABOR, :

Complainant, :

v. :

CONDOR CONSTRUCTION COMPANY, :

Respondent. :

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OSHRC DOCKET NO. 96-1120

APPEARANCES:

Barnett Silverstein, Esquire  
 New York, New York  
 For the Complainant.

Arthur H. Turner  
 Mt. Vernon, New York  
 For the Respondent, *pro se.*

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a construction site in New Rochelle, New York, on June 13, 1996; as a result, Respondent Condor Construction (“Condor”) was issued a serious citation alleging a violation of 29 C.F.R. 1926.100(a) and a willful/repeat citation alleging a violation of 29 C.F.R. 1926.652(a)(1).<sup>1</sup> Condor contested the citations, and a hearing was held January 14, 1998. Both parties have submitted post-hearing briefs.

Background

The record shows that the structure at the site was to be a church and day-care facility, and that Condor was the only contractor working at the site. OSHA’s first inspection of the site was on October 26, 1995, which resulted in a serious citation for not having a protective system in the excavation and for not providing employees with hard hats; OSHA and Condor settled the citation

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<sup>1</sup>The Secretary’s complaint amended the willful citation to allege a willful/repeat violation.

on February 6, 1996, and it became a final order of the Commission on April 8, 1996. OSHA's second inspection of the site was on March 13, 1996, which again resulted in a serious citation for not having a protective system in the excavation; OSHA and Condor settled this citation on June 13, 1996, and it became a final order of the Commission on August 23, 1996. (Tr. 7-17; C-1-2).

Everett Hall, the OSHA compliance officer ("CO") who had performed the October 26, 1995 inspection, also conducted the subject inspection; upon arrival, he saw four employees smoothing concrete that had just been poured in the footing form work along the bottom of the north wall of the unprotected excavation. The two employees on the south side of the footing were about 6 feet from the wall, while the two on the north side were 2 to 3 feet from the wall; in addition, these latter employees were not wearing hard hats and one of them at one point was 1 to 2 feet from the west wall. The CO told Arthur Turner, Condor's owner, who was also at the site, that OSHA had received a complaint about the excavation and that the employees had to be removed as the walls could collapse on them. Turner indicated he could not do so because of the concrete that had just been poured and instructed the employees to keep working; however, they exited 10 to 15 minutes later, after they had finished their work. (Tr. 34-42; 71-76; C-5; C-7).

The CO discussed the excavation with Turner and then called his office, after which Antonio Pietroluongo, the assistant area director of the office, arrived; Pietroluongo also discussed the excavation with Turner, telling him no one could reenter it until it was protected. Turner indicated he had to make sure the work was done right before the concrete set, and then went in the excavation himself, without a hard hat, to finish smoothing the concrete. Pietroluongo further discussed the situation with Turner when he exited the excavation, after which Pietroluongo signed and posted an "imminent danger" notice at the site. The CO measured the excavation, and found the north wall to be about 15 feet high and 66 feet long and the east and west walls to be about 9 feet high and 20 feet long; he did not measure the slopes, but estimated that they were between 60 and 90 degrees. The CO also took soil samples, one from a spoil pile on the side of the excavation and the other from the northwest area of the wall, and the OSHA lab results from the tests done on the sampling revealed the soil was Type B. The CO returned to the site on June 14, 1996, and observed that the "imminent danger" notice was still posted and that no one was in the excavation. The citations were issued on July 16, 1996. (Tr. 6-7; 22-29; 37-39; 43-47; 59-60; 69; 73; 78; 83-86; C-4-6).

Willful/Repeat Citation 2

This item alleges a violation of 29 C.F.R. 1926.652(a)(1), which provides as follows:

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.

Table B-1 in Appendix B to OSHA's excavations standard sets out the following maximum allowable slopes for excavations less than 20 feet deep:

Stable Rock	Vertical (90 degrees)
Type A	3/4:1 (53 degrees)
Type B	1:1 (45 degrees)
Type C	1 1/2:1 (34 degrees)

Appendix B also provides for a maximum allowable slope of 1/2:1, or 63 degrees, for short-term excavations in Type A soils that are 12 feet or less in depth. *See* Table B-1, Note 2.

CO Hall testified that the north wall was 15 feet high and that the excavation walls were sloped between 60 and 90 degrees; he also testified the soil was Type B and that the required slope for that soil was 45 degrees. (Tr. 37-39; 45-47; 59-60; 69; 73; 78; 85-86). However, Condor contends that it met the foregoing exception based on the testimony of Heino Ainso, the engineer it engaged to develop a shoring plan after the inspection; Ainso testified he measured the north wall to be 11 feet high, that he did plasticity and thumb tests on the soil at the site and determined it was Type A, and that a 60-degree slope was permissible for excavations less than 12 feet deep in Type A soils.<sup>2</sup> (Tr. 88-89; 97-102). The CO testified that he measured the excavation walls with a trench pole and that his measurements were accurate within an inch or two. (Tr. 37-39). In addition, C-6, CO Hall's record of his interview with Turner on June 13, 1996, states that Turner told him that the north side's depth was "about 15 feet or so." Regardless, even if the north wall was 11 feet high, it is clear that the above exception did not apply to the excavation and that Condor violated the cited standard.

First, the record shows that the excavation had been open since October 1995, and a short-term excavation, within the meaning of the exception, is one that has been open for 24 hours or less.

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<sup>2</sup>Ainso evidently agreed with Hall about the heights of the east and west walls. (Tr. 89; 102).

(Tr. 139; C-1-2). *See also* Table B-1, Figure B-1.1. Second, Ainsó conceded that the OSHA standard required Type A soil to be sloped at 53 degrees and that the excavation slopes, which he did not measure, were between 60 and 70 degrees. (Tr. 93; 98; 105). Third, despite Ainsó's opinion that the soil at the site was Type A, I conclude that it was Type B, based on the OSHA lab testing done on the soil sampling from the subject inspection and the two prior inspections. *See* C-1-2; C-5.<sup>3</sup> Fourth, the opinions of Ainsó and Turner that there was no danger of a cave-in were unpersuasive in view of the language of the standard, which presumes a hazard and requires compliance with its terms, and the opinion of Hall, who has been an OSHA CO since 1974, that the walls could have collapsed and resulted in serious injury or death. (Tr. 35; 40-42; 58-60; 74-76; 98-99; 138-43). Fifth, to the extent that Turner's statements, *i.e.*, that the north wall could not be sloped any further due to the house adjacent to the site and that installing shoring was too expensive, are assertions that compliance with the standard was infeasible, Condor has neither undertaken nor fulfilled its burden of proof with respect to this affirmative defense. (Tr. 140-41; C-3-4; C-6). *See Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1202 (No. 90-2304, 1993).

The Secretary has characterized this item as a willful/repeat violation. A violation is properly classified as repeated if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). As noted above, OSHA's October 26, 1995 inspection of the site resulted in a citation for not having a protective system in the excavation. C-1, the documents relating to that inspection, includes the settlement agreement signed by Condor and the Secretary, the citation and the CO's inspection notes, and the notice that the settlement became a final order; specifically, C-1 establishes that one of the cited items was for a serious violation of 29 C.F.R. 1926.652(a)(1), the same standard cited in this case, and that the settlement became a final order of the Commission on April 8, 1996. The violation was accordingly properly classified as repeated.

With respect to the willful characterization, a violation is willful if it was committed "with intentional, knowing, or voluntary disregard for the Act's requirements, or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). C-1,

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<sup>3</sup>The lab results, which appear at the end of C-1, C-2 and C-5, show that all of the samples were Type B, except for one sample from the March 13, 1996 inspection, which was Type C.

discussed *supra*, and C-2, which contains the same documentation as that in C-1 for the second inspection of the site, establish that Condor violated 29 C.F.R. 1926.652(a)(1) on October 26, 1995, and March 13, 1996; in addition, C-3 is a record of the meeting OSHA had with Arthur Turner on May 15, 1996, after the second inspection, and C-4 and C-6 are records of the interviews that CO Hall and Antonio Pietroluongo had with Turner at the site on June 13, 1996. These documents show that Turner had notice of the standard's requirements from the inception of the project and that in spite of his agreement in C-1, C-2 and C-3 to provide cave-in protection at the site he did not do so until after the third inspection. Further, the record shows that Turner told his employees to keep working in the excavation on June 13, 1996, after CO Hall asked him to remove them. (Tr. 39-41; C-5-6). Finally, the record shows that two employees were in the excavation without hard hats when the CO arrived, despite the fact that Condor was cited in this regard after the first inspection, and that Turner himself went into the excavation without a hard hat after Pietroluongo told him that no one could reenter. (Tr. 26-28; 36-37; 47-57; 71-76; C-1; C-7). Based on the record, I find that Condor was in willful violation of the standard. This citation is affirmed as a willful/repeat violation.

The Secretary has proposed a penalty of \$22,000.00 for this citation. CO Hall testified the initial penalty of \$55,000.00 was based on the willful/repeat characterization and his conclusion that the violation was of high gravity and lesser probability; he also testified that a 60 percent reduction was given due to Condor's size, but that no reduction for history or good faith was given because of the prior citations and the circumstances at the site. (Tr. 63-67). Condor contends the proposed penalty is excessive, asserting it was building the church at no profit to itself and that it shored the excavation at its own expense within a few days of the inspection; this assertion is set out in Turner's testimony and in Condor's post-hearing brief, which includes photos of the shored excavation. (Tr. 140-41). However, it is clear the CO's penalty determination included all of the relevant factors, and that Condor abated the violation, particularly in the circumstances of this case, is no basis for a penalty reduction. Moreover, C-3 shows that Turner was specifically advised during the May 15, 1996 meeting he had with OSHA that if he continued to violate the standard he could be cited for a willful violation with a penalty of up to \$70,000.00. I conclude the proposed penalty is appropriate, in view of the record as a whole, and a penalty of \$22,000.00 is accordingly assessed.

Serious Citation 1

This item alleges a violation of 29 C.F.R. 1926.100(a), which states as follows:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The record in this case shows that employees, including Turner himself, worked in the excavation without hard hats on the day of the inspection. (Tr. 26-28; 36-37; 47-57; 71-76; C-7). The record also shows that Condor was cited pursuant to the first inspection at the site for not providing hard hats and that Turner stated at that time that he was aware of the requirement and would see that employees wore hard hats; in addition, in the settlement agreement relating to that inspection, Turner agreed to comply with the Act in the future. *See* C-1. Condor's only contention with respect to this citation is that there was no danger of a cave-in and that the employees were not exposed to the cited hazard. (Tr. 138-43). This contention is rejected, based on the language of the standard and the opinion of CO Hall, which is clearly supported by the record, that rock and soil could have fallen on the employees not wearing hard hats and caused serious head injuries or even death. (Tr. 47-55). This item is affirmed as a serious violation, and the proposed penalty of \$1,000.00 is assessed.

Conclusions of Law

1. Respondent, Condor Construction Company, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.
2. Respondent was in serious violation of 29 C.F.R. 1926.100(a).
3. Respondent was in willful and repeated violation of 29 C.F.R. 1926.652(a)(1).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Citations 1 and 2 are affirmed, and penalties of \$1,000.00 and \$22,000.00, respectively, are assessed.

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Irving Sommer  
Chief Judge

Date: