United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR Complainant, v. LINDE ENTERPRISES, INC. Respondent.	OSHRC DOCKET NO. 95-1089

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 11, 1996. The decision of the Judge will become a final order of the Commission on May 13, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before May 1, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 11, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1089

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR Complainant v. LINDE ENTERPRISES, INC., Respondent	Docket Nr. 95-1089

APPEARANCES

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BEFORE

JOHN H FRYE, III
Judge, OSHRC

DECISION AND ORDER

I. INTRODUCTION

This case involves an action pursuant to Section 10 (c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq*, (hereinafter the "Act"). Respondent, Linde Enterprises, Inc. is a

corporation with its principal place of business in Honesdale, Pennsylvania. Respondent performed excavating work involving installation of utility lines at a worksite in Dunham, Pennsylvania, which was inspected by the Secretary.

As a result of an anonymous telephone call alleging that workers were involved in a dangerous work situation, David Martin, a compliance officer from the Wilkes-Barre area office of the Occupational Safety and Health Administration ("OSHA"), conducted the inspection of Respondent's Dunham worksite from April 28, 1995 through May 18, 1995. As a result, the Secretary issued one serious citation containing four items alleging violations of 29 C.F.R. §§ 1926.652(a)(1), 1926.652(g)(2), 1926.651(k)(1), 1926.602(a)(9)(ii) and 1926.602(a)(2)(i). Respondent filed a notice of contest of the citations on June 15, 1995, invoking the jurisdiction of the Occupational Safety and Health Review Commission. Jurisdiction over the subject matter and the parties has been established.

II. BACKGROUND

Acting following an anonymous complaint that Linde employees were working in unprotected trenches on Tigue Street in Dunmore, Mr. Martin's supervisor directed him to inspect the Respondent's work site on April 28. In fact, Respondent's worksite was on Dunham Drive, about one-half mile from Tigue Street. Mr. Martin's

directions took him to Dunham Drive via Tigue Street, where he noticed other contractors at work, but did not observe any excavations. He did not stop, but continued on to Respondent's worksite on Dunham Drive. (Tr. 32-38.)

When Mr. Martin arrived at Respondent's site at about 4:00 PM on Friday, April 28, 1995, he observed the worksite while he was parked on the south side of Dunham Street. Because Respondent was closing the worksite for the day, he took no further action at that time. He returned on Monday, May 1, 1995. (Tr. 17, 19).

On May 1, Mr. Martin first drove by the worksite making observations. Next, he videotaped Respondent's jobsite from a hill outside of the parking lot of a heavy equipment dealership located on Dunham Street. He then videotaped Respondent's jobsite from the entrance to GNB Batteries, a commercial establishment also located on Dunham Street. At about 8:30 AM, he presented himself to Mr. Joseph Jugan, Respondent's foreman on the site. (Tr. 46-48, 50; G-6).

The evidence with regard to the conversation between Mr. Martin and Mr. Jugan conflicts. Mr. Martin testified that Mr. Jugan consented to the inspection. Mr. Jugan testified that he asked Mr. Martin to "remain there and do nothing until I get back." In any event, both agree that Mr. Jugan excused himself and retrieved Respondent's written policy concerning OSHA inspections from his

truck. During this brief time, Mr. Martin measured and videotaped the excavation. Mr. Martin stated that Mr. Jugan did not explain the company policy to him until Mr. Jugan retrieved policy from the truck. Respondent's written policy presented to Mr. Martin stated:

> Company Policy: OSHA Inspections
>
> The following is the official Company policy of Linde Enterprises, Inc. regarding OSHA field inspections:
>
> Upon notification by an OSHA compliance officer of a job site inspection, the person in change of the site shall advise the compliance officer that he is to wait until one of the owners of Linde Enterprises, Inc. or a representative designated by the owners arrives on the job site.

Mr. Martin then stopped inspecting. Some time later, Mr. Scott Linde arrived and advised him that Respondent would not consent to the inspection without a warrant. Mr. Martin returned on May 9 with a warrant and was permitted to inspect. (Tr. 21-23, 51-53, 85-86, 109; R-1.)

III VALIDITY OF THE APRIL 28 - MAY 1 INSPECTION

Respondent submits that, based upon the foregoing, Mr. Martin had no probable cause to be at the worksite based upon the anonymous complaint concerning a worksite about one-half mile away. Respondent also argues that Mr. Martin videotaped the trench from private property on May 1, 1995, without a warrant in circumstances where Respondent had a reasonable expectation of privacy. Moreover, Respondent argues that after he was asked by Mr. Jugan to wait until

one of Respondent's representatives arrived, Mr. Martin videotaped and measured the trench. Respondent believes that Mr. Martin's conduct violated its Fourth Amendment right to request a warrant, and that its motion to exclude the all the evidence gathered prior to the warrant being obtained should be granted. *See Marshall v. Barlow's, Inc.*, 1436 U.S. 307, 56 L. Ed. 2d 305, 314 (1978) (warrantless OSHA inspections are unreasonable under the Fourth Amendment).

Respondent's motion is denied. First, Respondent's argument that the anonymous complaint was directed toward another contractor is not supported. While the complaint did refer to work being done on Tigue Street, where Respondent was not present, it also specifically referred to Respondent by name and to the excavation work which Respondent was engaged in. Moreover, the directions given Mr. Martin clearly sent him to Respondent's worksite, and while Mr. Martin observed some construction work on Tigue Street, he did not observe any excavation work in progress there. I find that the complaint contained sufficiently information to provide OSHA with a reasonable basis on which to inspect Respondent at its Dunham Street worksite.

Second, Respondent's argument that Mr. Martin entered on private property in order to videotape its activities on May 1, thereby depriving it of a reasonable expectation of privacy, is not

persuasive. Respondent urges that the "open-fields" doctrine does not apply here, because it was working on private property in a trench below ground level that was not readily observable from public property. However, there is no evidence that Mr. Martin entered on any property to which the public's access was restricted. As a result, the "open fields" doctrine clearly applies.

> Under that principle, there is no constitutional violation where an inspector makes observations from areas on commercial premises that are out of doors and not closed off to the public, even if the inspector entered the premises without permission.

Secretary v. Concrete Construction Co., 15 OSHC 1614, 1617 (Rev. Com. 1992). In this case, Mr. Linde testified that Mr. Martin would have had to have taped from the GNB Batteries parking lot, and produced photographs of that lot. (See R-2 - R-6.) Two signs at the entrance to the parking lot advise that:

> This entrance is reserved for the sole use of GNB employees, customers, and suppliers. Contractors use Gate 3;
>
> and
>
> Warning. This property is protected by electronic surveillance.

The photographs show that the lot is not protected by a gate or fence. This fact, coupled with the fact that the first sign invites customers and suppliers to use the lot, clearly indicates that the

GNB parking lot was not "closed off to the public" as contemplated by *Concrete Construction*.

Third, because Mr. Linde, not Mr. Jugan, informed Mr. Martin that Respondent would not consent to a warrantless inspection, Respondent can make no claim that Mr. Martin ignored that demand when he measured and videotaped the trench during the period that Mr. Jugan was retrieving the company's policy from his truck. Once presented with that policy, which simply asked that he await a company representative, Mr. Martin complied. Assuming, as Respondent maintains, that Mr. Jugan initially had asked Mr. Martin to await that representative, Mr. Martin's failure to do so does not violate Respondent's Fourth Amendment rights. At most, it offends § 8(e) of the Act, which provides that the Secretary shall afford a representative of the employer the opportunity to accompany the inspector. Here, there is no showing that Mr. Martin acted in such a way as to deny Mr. Jugan that opportunity. Nor does it appear that Mr. Jugan's brief absence prejudiced Respondent in the preparation of its defense. *Secretary v. Concrete Construction Co., supra,* 15 OSHC at 1617-19.

IV. THE MERITS OF THE CITATIONS

Citation 1, Item 1

The Secretary cited Respondent for a violation of 29 C.F.R. § 1926.652(a)(1). This regulation provides:

> 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.

Mr. Martin observed Respondent's employees working in the excavation on May 1, 1995. (Tr. 20-21, 147, 157, G-2 [Video Counter Nos. 0:51, 3:02]). He measured the excavation, and found the north side to have a depth of 10 feet and the south side a depth of six feet. He found a small bench, 20 to 22 inches wide, located on the north side six feet from the bottom of the excavation. There was no slope. (Tr. 27-28, 64). He observed trash compactor trucks, trucks delivering heavy machinery, and tractor trailers traveling along Dunham Street within 20 to 30 feet of the excavation. (Tr. 132). Based on this, Mr. Martin concluded that the adjacent road was subject to extremely heavy traffic. (Tr. 143; G-2 [Video Counter Nos. 0:56-1:35]).

Mr. Martin conducted a manual test on the soil in the excavation on May 1, 1995, and determined that the soil was not cohesive. Based on this and the heavy traffic, he concluded that the soil in the excavation should be classified as Type B. (Tr. 175). Accordingly, he testified that, to comply with the OSHA

regulations, the excavation should have been sloped on a one-to-one basis. (Tr. 28). He determined that fractures, or asphyxiation resulting in serious physical harm or death could result from the conditions present in the excavation. (Tr. 200).

Mr. Martin recommended a penalty of $900. In determining this amount, Mr. Martin considered the severity and probability of injury associated with the violation. The proposed penalty also included a forty percent reduction for Respondent's size. A fifteen percent reduction was made for good faith, based on the fact that the employer had a written safety policy. Respondent did not receive a reduction for history, as it had one serious violation within the last three years. (Tr. 201, 202)

Respondent notes that it is charged with violating 29 C.F.R. § 1926.652(a), which requires an adequate protective system designed in accord with § 1926.652(b) or (c). It notes that § 1926.652(b)(2) permits sloping and benching systems to exist consistent with Appendices A and B to that subpart. Citing Appendix B, Figure B-1.1 for excavations made in Type A soil, it maintains that the slope of the trench was 1/2:1, permissible for excavations which are open 24 hours or less and are 12 feet or less in depth. Mr. Yelland, Respondent's superintendent, testified that the trench was sloped at a ratio of 1/2:1. (Tr. 369-70.) Mr. Yelland also indicated that he

conducted both visual and "thumb" tests on the soil, and he concluded that the soil was "hardpan" (Tr. at 360-362), which is specifically defined as Type A soil in Appendix A to 29 C.F.R. § 1926.652. Similarly, Mr. Linde testified that he performed visual inspections and concluded that the soil was hardpan. (Tr. at 349-350).

The first question to be decided is whether the soil was properly classifiable as Type A. Respondent is correct that hardpan is, by definition, Type A soil. However, Mr. Martin's concluded that the soil was not cohesive, a condition inconsistent with hardpan. It is unlikely that a Compliance Officer with Mr. Martin's experience would make an error in this regard. If the soil were hardpan, that condition should be evident from the soil deposited in the spoil pile, where Mr. Martin obtained his sample. It is not likely that clumps of hardpan would be completely broken up in the digging process.

Moreover, the presence of heavy truck traffic on the adjacent roadway dictates against the Type A classification. Appendix A provides that no soil is Class A if it is subject to vibration from traffic. While Mr. Martin conceded that the standard does not specify a safe distance from the traffic (Tr. 172-173), Dr. Peck indicated that heavy traffic on a road located some 20 to 30 feet from the excavation "... would cause vibrations that would be transmitted to the soil and cause it to become additionally unstable." (Tr. 297.) It is clear that the soil in question was properly classified as Type

B. The slopes which Respondent maintains were employed in the trench are not acceptable for Type B soil.

Additionally, there is some question whether the trench was sloped or benched. If the trench walls were sloped in Type A soil, the 1/2:1 ratio to which Mr. Yelland testified would be acceptable. While the Respondent's witnesses often spoke in terms of slopes, it is not clear whether they intended to imply that the walls were sloped to the exclusion of utilizing benches. Mr. Yelland seems to say that both were used. (Tr. 364-70.) Mr. Martin clearly indicated that the trench walls were not sloped, and that the north wall was benched. If the Respondent employed benches, a ratio of 3/4:1 would be required (see Appendix B, § B1.1(2)), and Mr. Yelland's ratio of 1/2:1 would be unacceptable. In sum, the preponderance of the evidence supports the issuance of this citation.

Citation 1, Items 2a and 2b

Item 2(a) alleges a violation of 29 C.F.R. § 1926.652(g)(2), which states:

> Excavations of earth material to a level not greater than 2 feet (.61m) below the bottom of a shield shall be permitted, but only if the shield is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the shield.

Item 2(b) alleges a violation of 29 C.F.R. § 1926.651(k)(1), which states in part that:

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failures of protective systems, hazardous atmospheres, or other hazardous conditions.

When Mr. Martin arrived at the worksite on May 9, 1995, he observed a trench box protruded half way out of the excavation. A worker was in the trench. Mr. Yelland was present.[1] After Mr. Martin's arrival, the worker exited the trench and the box was more fully inserted, an operation that entailed some difficulty because the trench was not wide enough to accommodate the trench box. (Tr. 22-23, 204, 236). Mr. Martin measured the trench and the trench box and found the depth of the trench to be eight feet and the height of the trench box to be five feet. (Tr. 204, G-2, Video Counter Nos. 5:28-5:44). Mr. Yelland testified that the trench box reached to about 2 1/2 to 3 feet of the bottom of the trench. (Tr. 376, 382).

Mr. Martin observed earth falling into the excavation while a worker was present in the excavation after the box had been more fully inserted into the trench. Mr. Martin observed that the worker was working below the level of protection provided by the trench

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[1] While Mr. Yelland testified that he had not recollection of a worker in the trench at this time (Tr. 377, 380), Mr. Martin's testimony that a worker was present was unequivocal. (Tr. 236-38, 240-43.) In this circumstance, I credit Mr. Martin's testimony as accurate.

box. (Tr. 23, 211, G-2., Video Counter No. 9:18). He also observed heavy traffic passing near the excavation which could reduce the stability of the soil, and that the soil had been previously excavated. (Tr. 211-12, G-2, Video Counter Nos. 4:40-5:27). Mr. Martin testified that the failure to properly install a protective system into this excavation could result in broken bones or asphyxiation of a worker. (Tr. 212).

Respondent asserts that it was not possible to insert the trench box far enough into the trench to comply with § 1926.652(g)(2) because the box was obstructed by solid rock and some utility lines. (Tr. 255-58, 267, 370, 378.) When an employer makes an affirmative defense that compliance with the regulations is impossible or infeasible, the employer bears the burden of demonstrating that compliance with the standard is impossible and that the employer used alternative means to protect its employees or that alternative means were unavailable. *See, Bancker Construction Corp. v. Reich*, 31 F.3d 32, 34 (2d Cir. 1994); *Brock v. Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1136 (8th Cir. 1988); *Long Beach Container Terminal, Inc. v. OSHRC*, 811 F.2d 471, 479 (9th Cir. 1987); *Noblecraft Industries, Inc. v. Sec. of Labor*, 614 F.2d 199, 205 (9th Cir. 1980).

In *Dun-Par*, an employer was cited for failing to provide guardrails at a construction site. As its defense, Dun-Par claimed that it was impossible to install the guardrails. The court held that since it is the employer's responsibility for its employee's safety under the Act, the employer must "affirmatively investigate alternative measures of preventing the hazard, and actually implement such alternative measures, to the extent feasible." *Id.* at 1139.

In the present case, Respondent failed to adequately protect its employees from cave-ins, but did not explore alternative means of protecting its employees in the trench. Mr. Yelland indicated that existing utilities and a rock preventing the box from being inserted further into the excavation. (Tr. 379). However, the defense of impossibility of performance will not lie "... if an employer shows merely that compliance would be difficult, inconvenient, or expensive." *Long Beach, supra*. He also insisted that a trench plate, which had been inserted, would protect the workers. (Tr. 380). However, the video shows soil sporadically flowing into the trench from the vicinity of the trench plate even as an employee was working, as well as the presence of heavy truck traffic immediately above the employee. (G-2, Video Counter No. 9:18). Respondent provided no evidence that it investigated and attempted to implement any alternative measures to protect employees

from a cave-in. Consequently, its arguments regarding the impossibility or infeasibility of compliance are rejected.

Moreover, when Mr. Martin arrived on the site, the trench box was only inserted to the extent of one-half of its height and a worker was in the trench. Clearly, that worker received little if any protection from the trench box. This hazard was blatant and occurred in the presence of Respondent's competent person, Mr. Yelland. Therefore, I must conclude that Mr. Martin is correct that Mr. Yelland failed to recognize a blatant hazard. The Secretary has demonstrated that Respondent violated §§ 1926.651(k)(1) and 1926.652(g)(2).

Respondent urges that these items, and item 1, involving the sloping of the trench, should be classified as "Other Than Serious." Respondent urges that

> ... it is hard to imagine <u>any</u> scenario under which any employee in the trenches which are the subject of [these items] could be subject to a "substantial probability" of asphyxiation and fracture hazards as alleged.... The trenches were sloped, and a trench shield was installed in each case, respectively. In the case of the trench shield, it was resting on one side on <u>solid rock</u> which could not have collapsed below the shield. Thus, under any scenario, Citation I, Items 1 and 2a should be reduced in classification from "Serious" to "Other Than Serious", even assuming <u>arguendo</u> that LINDE violated the regulations. The monetary penalties should be eliminated or reduced correspondingly as well. (Respondent's brief, p. 13.)

Trenching is a hazardous activity. Despite Respondent's protestations to the contrary, it violated OSHA standards applicable

to these trenches. The close proximity of heavy truck traffic and the sporadic spilling of soil into the trench partially protected by the trench box and shield dramatize the potential for serious injuries even after the trench box had been more fully inserted into the trench. Similarly, the failure to properly slope or bench the trench inspected on May 1 carried with it the potential for serious injuries. These violations were appropriately classified as "serious," and the penalties properly calculated by Mr. Martin.

Citation 1 Item 3

This item alleges a violation of 29 C.F.R. § 1926.602(a)(9)(ii) which provides:

> All bidirectional machines, such as rollers, compactors, front-end loaders, bulldozers and similar equipment, shall be equipped with a horn, distinguishable from the surrounding noise level, which shall be operated as needed when the machine is moving in either direction. The horn shall be maintained an operative condition.

Mr. Martin testified that he observed a worker operating Respondent's front-end loader on May 9, 1995, on the Respondent's worksite. (Tr. 195-96, 219-220; G-2, Video Counter Nos. 6:46-7:15). Mr. Martin saw the front-end loader back up several times in a ten-minute period but did not hear the reverse signal alarm operating. (Tr. 215, 220, 271; G-2, Video Counter Nos. 6:46-7:15). Mr. Yelland was present. (Tr. 360). Mr. Martin testified that when this

situation was brought to the foreman's attention, the latter indicated that the alarm had been disconnected for some reason and immediately reconnected it. Thereafter, Mr. Martin heard the alarm operating. (Tr. 214-15.) An accident which occurs as a result of an inoperable back-up alarm could cause an employee to suffer death from internal injuries, fractures, blood loss or asphyxiation. (Tr. 220).

Respondent urges that it has an active, ongoing vehicle maintenance program (R-9), and quickly corrected the violation. It also urges that there is no evidence that it knew of and permitted the condition to exist. However, Mr. Yelland's presence on the site is sufficient to impute knowledge to Respondent. Respondent urges that the violation should be classified as other-than-serious. While the violation is clearly serious, Respondent's quick action to correct it and its ongoing vehicle maintenance program dictate that the penalty should be reduced to $00.

Citation 1 Item 4

This item 4 alleges a violation of 29 C.F.R. § 1926.602(a)(2)(i), which provides, in part:

> Seat belts shall be provided on all equipment covered by this section and shall meet the requirements of the Society of Automotive Engineers, J386-1969, Seat Belts for Construction Equipment.

Mr. Martin testified that on April 28, 1995, he observed an employee riding on the access ladder of a front-end loader, without being secured in the vehicle by a seat belt. (Tr. 129, 221, 222; G-2, Video Counter Nos. 0:05-0:21, 0:39-0:44). Mr. Martin's observations are not relevant to the issue of whether the front-end loader was equipped with seat belts meeting the requirements of the cited standard. This citation is vacated.

V. CONCLUSIONS OF LAW

A. Respondent Linde Enterprises, Inc., is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) ("the Act").

B. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

Citation 1, Item 1.

C. Respondent Linde Enterprises, Inc., was in serious violation of the standard set out at 29 CFR §§ 1926.652(a)(1). A penalty of $900 is appropriate.

Citation 1, Items 2a and 2b

D. Respondent Linde Enterprises, Inc., was in serious violation of the standards set out at 29 C.F.R. §§ 1926.652(g)(2) and 1926.651(k)(1). A penalty of $900 is appropriate.

E. Respondent Linde Enterprises,, Inc., was in serious violation of the standard set out at 29 C.F.R. § 1926.602(a)(9)(ii). A penalty of $00 is appropriate.

F. Respondent Linde Enterprises,, Inc., was in not serious violation of the standard set out at 29 C.F.R. § 1926.602(a)(2)(i).

VI. ORDER

A. Citation 1, items 1, 2a, 2b, and 3 are affirmed as serious violations of the Act.

B. Citation 1, Item 4, is vacated.

C. A total civil penalty of $1,800 is assessed.

JOHN H FRYE, III
Judge, OSHRC

Dated: APR 11 1996
Washington, D.C.