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

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 98-1660
P.A. LANDERS, INC. ,	:	
Respondent.	:	

ORDER

This matter is before the Commission on a direction for review entered by Chairman Thomasina V. Rogers on February 25, 2000. The parties have now filed a Stipulation and Settlement Agreement.

Having reviewed the record, and based upon the representations appearing in the Stipulation and Settlement Agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the Stipulation and Settlement Agreement do not appear to be contrary to the purposes of the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the Stipulation and Settlement Agreement into this order and we set aside the Administrative Law Judge's Decision and Order to the extent that it is inconsistent with the Stipulation and Settlement Agreement. This is the final order of the Commission.

So ordered.

Date: July 24, 2000

/s/

Thomasina V. Rogers
Chairman

/s/

Gary L. Visscher
Commissioner

/s/

Stuart E. Weisberg
Commissioner

98-1660

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, DC 20210

Richard D. Wayne, Esq.
John P. Martin, Esq.
Hinckley, Allen & Snyder, LLP
28 State Street
Boston, MA 02109

G. Marvin Bober
Administrative Law Judge
Occupational Safety and Health
Review Commission
1120 20th Street, Ninth Floor
Washington, D.C. 20036-3419

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ALEXIS M. HERMAN, Secretary of labor, Complainant, v. P.A. LANDERS, INC., Respondent.	OSHRC DOCKET NO. 98-1660

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which is currently pending before the Commission.

II

It is hereby stipulated and agreed by and between the Complainant, Secretary of Labor and the Respondent, P.A. Landers Inc. that:

1. Complainant hereby amends the proposed penalty for citation 2, item 1, alleging a willful violation of 29 C.F.R. 1926.652 (a)(1) from $55,000, as originally proposed by the Secretary and

assessed by Judge Bober in his Decision and Order, to a $40,000 penalty. Respondent hereby withdraws its notice of contest to Willful Citation 2, item 1 as amended.

2. Respondent hereby withdraws its notice of contest to Serious Citation 1, item 1, alleging a violation of Section 5(a)(1) of the Act, and the proposed penalty of $2,500, affirmed by Judge Bober below.

3. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of these proceedings.

4. Respondent hereby agrees to pay the amount of $12,500 at the time of execution of this Agreement by submitting its check made payable to the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), to the Boston Area Office South. Every thirty (30) days thereafter, Respondent shall submit the amount of $10,000 to the OSHA Area Office until the amended penalty of $40,000 for willful citation 2 is satisfied, which shall be deemed to be within 90 days of execution of this agreement. In the event that respondent is more than 7 days delinquent with any of the payments set forth in this schedule, the total remaining unpaid balance shall become immediately due to OSHA.

5. None of the foregoing agreements, statements, stipulations, or actions taken by P.A. Landers Inc. shall be deemed an admission by Respondent of the allegations contained in the citations or the complaint herein. The agreements, statements, stipulations and actions herein are made solely for the purpose of settling this matter economically and amicably and shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provision of the Occupational Safety and Health (OSH) Act of 1970.

6. Respondent states that there are no authorized representatives of affected employees.

7. The parties agree that this Stipulation and Settlement Agreement is effective upon execution.

8. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at its Hanover, MA. workplace in a conspicuous manner on the 14th day of July, 2000, pursuant to Commission Rules 7 and 100, and will remain posted for a period of ten (10) days.

Dated this 14th day of July, 2000.

Respectfully submitted,

HENRY L. SOLANO
Solicitor

JOSEPH M. WOODWARD
Associate solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional
Trial Litigation

/s/
____
RICHARD D. WAYNE, ESQ.
JOHN P. MARTIN, ESQ.
Attorneys for P.A. Landers, Inc.
HINCKLEY, ALLEN & SNYDER, LLP
28 State Street
Boston, MA 02109

/s/
____
ORLANDO J. PANNOCCHIA
Attorney for the Secretary of Labor
USDOL, Office of the Solicitor
200 Constitution Ave., NW
Suite S-4004
Washington, DC 20210

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

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR,

Complainant,

v.

P.A. LANDERS, INC.

Respondent.

OSHRC DOCKET NO. 98-1660

APPEARANCES:

David L. Baskin, Esquire
Office of the Solicitor
U. S. Department of Labor
Boston, Massachusetts
For the Complainant.

Richard F. Schiffmann, Esquire
3180 Main Street
Braintree, Massachusetts
For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review a serious citation and a willful citation, and the penalties proposed therefore, issued by the Secretary of Labor pursuant to section 9(a) of the Act.

On April 9,1998, Brian Hennessey, an employee of P.A. Landers ("Landers") was injured when a trench he was working in collapsed on him at a work site located in Plymouth, Massachusetts.[1] As a

[1] At the hearing, the parties identified the trench in which the accident occurred as the "existing manhole trench" and a second trench, which is addressed in the discussion relating to the serious citation, as the "new manhole trench." (Tr. 19-20).

result of this incident, Patrick Griffin, an OSHA compliance officer ("CO"), conducted an inspection of the work site, and, following the inspection, OSHA cited Landers for a serious violation of section 5(a)(1) of the Act and a willful violation of 29 C.F.R. 1926.652(a)(1). Landers contested the citations, and an administrative trial was held in Providence, Rhode Island on August 24, 1999. Both parties have filed post-trial briefs.

Jurisdiction

The parties stipulated that Landers is an employer subject to the Act and that the Commission has jurisdiction in this matter. (Tr. 7).

Stipulations

The parties stipulated to the following at the commencement of the trial:

1. The Commission has jurisdiction in this matter;

2. The Respondent is an employer subject to the Act;

3. The inspection was conducted by an authorized representative of the Complainant on April 9, 1998 through July 24, 1998, and the citations were issued on September 23, 1998;

4. The Respondent filed a notice of contest on September 25, 1998.

Background

The subject site was a condominium development being built around a preexisting golf course. Landers, the trenching contractor, was responsible for installing the sewer system for the development, which required digging a trench for a sewer line in the 17th tee-off area of the golf course.[2] On April 9, 1998, Landers had four employees on the job: laborers Brian Hennessey and Bob O'Neil, excavator operator Tim Fernandes, and site supervisor Charles Jesse. That morning, which was the first day of the job, Landers had dug a trench to access an existing manhole so that sewer piping could be installed there; the trench was about 28 feet long and 10 feet wide, and the depth was 9.5 feet at the manhole end and about 5 feet at the other end.[3] Mr. Hennessey entered the trench to mark the manhole, after which Scott Sherman, an employee of Jericho Concrete Cutting, entered the trench to cut a hole in the bottom of the manhole where Mr. Hennessey had marked it.[4] After Mr. Sherman had exited the trench, Mr. Fernandes, who had resumed the excavation work, asked Mr. Hennessey to go back into the trench and check it

---

[2]Because the golf course remained open, the developer's project manager had instructed Landers to not disturb the 17th tee-off box.

[3]The trench and manhole are shown in the Secretary's photographs, C-1 through C-37.

[4]Although the shallow end of the trench was sloped for entry, the sidewalls were not sloped properly or shored and no trench box was in use.

because he believed the excavator bucket had struck something. Mr. Hennessey reentered the trench and found nothing unusual; however, as he was proceeding to exit the trench, one of the sides caved in and buried him up to his neck. As a result of the cave-in, Mr. Hennessey sustained multiple injuries, including broken ribs and a broken wrist, hip damage and torn rotator cuffs, and bruising to some internal organs.

Willful Citation 2, Item 1 - Proposed Penalty: $55,000

29 C.F.R. 1926.652(a)(1), the cited standard, provides in pertinent part as follows:

§ 1926.652 Requirements for protective systems.

> (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 (c) of this section****
>
> (1) *Option (1)--Allowable configurations and slopes.* (i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options *** .

The citation alleges as follows:

> Employees were exposed to and received serious injury while working in a trench that was between 5 feet to 9 feet deep without the protection of a shoring system, sloping of the ground or some equivalent protection to guard against a sidewall collapse.

The record establishes that the trench in which the accident occurred was 9.5 feet deep at the manhole end and about 5 feet deep at the point where Mr. Hennessey was injured. The record also establishes that the soil in the trench was a sandy "Type C" soil that had been previously disturbed and that although the trench should have been sloped as set out above or protected by shoring or a trench box, the required protection was not in place in the trench. (Tr. 21-22; 60; 72-73; 96-97; 108; 114-15). Landers does not dispute this evidence, but contends, rather, that Mr. Hennessey had received safety training prior to performing any outside work and that he went into the trench without either the knowledge of or any instruction to do so from his supervisor, thus placing himself at risk. I disagree, for the following reasons.

Mr. Jesse testified he had told Mr. Hennessey to work with Mr. Fernandes and that he had not told him to enter the trench. (Tr. 81-83; 145; 150-52). However, Mr. Hennessey testified that Mr. Jesse asked him to go into the trench to mark the manhole and that Mr. Jesse was present when he did so. Mr. Hennessey further testified that he entered the trench a second time, again in the presence of Mr. Jesse, to clean up after Mr. Sherman. (Tr. 20-22; 27-30; 43-48). It is unclear whether Mr. Jesse was present when Mr. Hennessey made his third entry into the trench and there is no evidence he instructed him to do so.[5] Regardless, that Mr. Jesse may not have known of the third entry is of no moment in light of his

---

[5]Although Mr. Hennessey was "pretty sure" Mr. Jesse was there when he entered the trench the third time, Mr. Jesse testified that he been in the job site trailer and was on his way back to the trench when it collapsed. (Tr. 30; 120-21; 144).

knowledge of the prior entries, and Mr. Hennessey's testimony is supported by that of Mr. Sherman, who stated that Mr. Jesse saw him enter the trench to perform his cutting work and also saw him exit the trench. (Tr. 60-61). Mr. Hennessey's testimony is further supported by the nature of the work that was taking place and the fact that Mr. Jesse was overseeing that work. Finally, Mr. Hennessey's testimony is supported by the fact that, as set out *infra* in the discussion relating to the serious citation, Mr. Jesse and Mr. Hennessey had entered another unprotected trench together that morning. Based on the record as a whole, Mr. Hennessey's testimony is credited over that of Mr. Jesse. Accordingly, Landers' contention that Mr. Hennessey entered the trench without any instruction or knowledge of Mr. Jesse is rejected.

Turning to Landers' other contention, that Mr. Hennessey was adequately trained, Landers' safety director Steven Casey testified that his practice in April of 1997, when Mr. Hennessey was hired, was to conduct an orientation with each new hire and to go over all of Landers' safety policies, including excavation safety, after which the employee would sign off on each policy. (Tr. 156-59). However, Mr. Hennessey testified that the only information he received when he was hired, which he read and signed, was Landers' drug testing policy and general rules and that he recalled nothing about excavations; he also testified that Landers had not trained him in trenching safety and that no one had ever told him "what you can do and what you can't do" in regard to trenches. (Tr. 16-17; 34-36). Moreover, Mr. Casey testified that site supervisors were responsible for conducting job site safety meetings, and Mr. Jesse testified he had held no such meeting before the job began that day. (Tr. 75; 162). In fact, the only evidence in the record indicating that Mr. Hennessey was provided with any information about trenches appears in C-39, which is a copy of Landers' employee safety rules; specifically, Rule 37 of C-39 states as follows:

> TRENCHES more than 5 feet deep shall be shored, sloped, or a trench shield used and material stored at least 2 feet from the edge. Trenches more than 4 feet deep shall have ladders extended 3 feet above the trench, within 25 feet of workers.

In view of the foregoing, it is clear that although Landers had a rule requiring sloping, shoring or trench shields in trenches over 5 feet deep, the trench at the site was not protected as required by the standard. It is also clear that the rule set out above, even if Mr. Hennessey did read it when he was hired, does not constitute adequate training in trenching safety. Landers' contention that Mr. Hennessey was adequately trained is rejected, and, on the basis of the record, Landers was in violation of the cited standard.

This citation has been classified as willful. A willful violation is one committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHA 1249, 1256 (No. 85-355, 1987). As *Williams* further states:

> A willful violation is differentiated by a heightened awareness -- of the illegality of the

> conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete....However, the test of an employer's good faith for these purposes is an objective one -- whether the employer's belief concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances.

13 BNA OSHC at 1256-57, 1259 (citations omitted).

In support of the willful characterization, CO Griffin testified that he "felt that the knowledge was there, that the official of the company ... Mr. Jesse, was a superintendent and he observed these men [Mr. Hennessey and Mr. Sherman] entering the trench ... without proper protection." The CO said that Mr. Jesse had told him that he was a "competent person," that he had had "competent person" training, and that he knew OSHA's trenching requirements. The CO also said it should have been evident, once Mr. Jesse knew that the trench would be over 9 feet deep, that there was a need for proper sloping, shoring or a trench box; however, Mr. Jesse stated both that he could not "tear this tee box up" and that he had not intended to use a trench box.[6] (Tr. 94-98; 113-25). CO Griffin summarized the willful classification as follows:

> We look for knowledge and training of an individual, a management individual that can direct people, that in this particular case, we would look at the fact that the superintendent, who is the representative of the company on site and directs work, knew that a trench was going to be so many feet deep, that it was going to exceed the requirements of a safe excavation without shoring or sloping and that we would look at that and he would also -- the employee that entered the trench was -- did so under the watchful eyes of that superintendent. The superintendent, again, knew that the trench did not meet the standards, allowed the individual to enter the trench to perform the work, had been trained as a competent person, knew what was required under the OSHA standards, had the ability and the authority to make corrections and to make it a safe trench by either using a shoring technique such as hydraulic or skeleton shoring or sloping it and chose not to do that, whether it was because the golf course was going to be more extensively damaged, that, in itself, is not a reason to place a man in a trench that is unshored. (Tr. 125-26).

In defense of the willful characterization, Mr. Jesse testified that he had worked for Landers since December 1997, that he had been a site supervisor for about three months at the time of the accident, and

---

[6]The CO testified that Mr. Jesse had seen the specifications for the trench beforehand and knew how deep it would be. (Tr. 114).

that he had been a site supervisor for another company before working for Landers; he further testified that he had received "competent person" training in trenches in February 1998, that Steven Casey and others had conducted the training, and that the training had lasted four to five hours. Mr. Jesse conceded that the trench was not protected as required by the standard and that the developer's project manager had told him that the golf course superintendent did not want Landers to disturb the 17th tee-off box. However, Mr. Jesse said the trench was sloped gradually, although not at the angle mandated by the standard, and that he had thought the sloping was adequate and safe for entry and that the trench was stable, particularly at the deeper end where the manhole structure was. He also said that he had not believed a trench box was necessary and that he would not have deliberately sent a man in harm's way. (Tr. 69-80; 135-46).

After careful consideration of the record and the Commission's decision in *Williams, supra,* I conclude that the violation in this case was willful. Although Mr. Jesse did not act with plain indifference to employee safety, he did act with conscious disregard of the standard. The record shows that Mr. Jesse had received "competent person" training in trenches approximately two months before the accident, that he knew OSHA's trenching requirements, and that Landers' own safety rules required sloping, shoring or trench shields in trenches over 5 feet deep. The record also shows that he knew the day before the job began the depth at which Landers employees and Mr. Sherman would be working. (Tr. 71-74). Finally, the record shows that Mr. Jesse did not slope the trench properly in part because of the instruction that he was not to disturb the 17th tee-off box. Despite these circumstances, Mr. Jesse did not arrange to have a trench box at the site, which, based on the fact that he called for one immediately after the accident and it arrived before the CO left that day, could easily have been done the day before.[7] (Tr. 115). Moreover, in addition to exposing Messrs. Hennessey and Sherman to the subject trench, Mr. Jesse and Mr. Hennessey had worked in another unprotected trench that day that was 7 to 8 feet deep.

In deciding this matter, I have considered Mr. Jesse's testimony that he believed the sloping was adequate and the trench was safe and that he would not have deliberately sent an employee into an unsafe trench. However, as set out in *Williams*, the test of an employer's good faith is an objective one, and here, the question is whether Mr. Jesse's belief that the trench was safe was reasonable under the circumstances. I find it was not. This citation item is affirmed as a willful violation, and the proposed penalty of $55,000.00, which is appropriate on the facts of this case, is assessed.

---

[7]The CO's testimony about the trench box was corroborated by the deposition testimony of Joseph Moreau, the project manager of the company that had undertaken the development of the condominium project. (Tr. 115; C-38, pp. 10-11).

Serious Citation 1, Item 1 - Proposed Penalty: $2,500.00

Section 5(a)(1) of the Act provides as follows:

> Each employer shall provide to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The citation alleges as follows:

> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that, employees were exposed to fall [sic] and serious contusions by riding in a bucket of a crawler excavator to align a precast manhole in a trench. Among other methods, one feasible and acceptable abatement method to correct this hazard is to provide a railed ramp across the trench.

To establish a violation of section 5(a)(1) of the Act, the Secretary must prove that: (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) a feasible and useful means of abatement existed by which to materially reduce or eliminate the hazard. *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869 (No. 92-2596, 1996).

The record shows that after Mr. Sherman went into the first trench to perform his work, the Landers employees went to an area about 180 feet away to dig a second trench in which a new manhole would be installed; this trench was 7 to 8 feet deep, about 7 feet along each side, and 4 to 5 feet wide at the bottom and about 30 feet wide at the top. (Tr. 22-24; 39-40; 87-89; 113). Mr. Hennessey testified he went into the second trench about three times to measure and grade it. The first time he went down alone, and, as the trench was shallower then, he was able to slide down a side; however, the trench was too deep on his subsequent entries, and either Mr. Fernandes or Mr. Jesse suggested he be lowered down into the trench by means of the excavator bucket. Mr. Hennessey said he went down in the bucket twice, and that on one of these entries Mr. Jesse went down in the bucket with him. (Tr. 24-27; 41-43; 50-53).

Mr. Jesse denied having any knowledge that Mr. Hennessey had gone down into the trench by means of the excavator bucket, indicating that the trench was somewhat sloped and had been "ramped" for access. (Tr. 85-90). However, Mr. Hennessey testified that the trench was not sloped, and, for the reasons set out *supra*, his testimony is credited over that of Mr. Jesse. (Tr. 41-42). Consequently, I find as fact that both Mr. Hennessey and Mr. Jesse were lowered down into the trench by means of the excavator bucket.

As to the elements of a section 5(a)(1) violation, CO Griffin testified that riding in an excavator bucket is not an industry practice, that OSHA considers it a hazard, and that "we cite it when see it." He further testified that, based on his experience and conversations he had had with licensed operators, the

Commonwealth of Massachusetts also considers riding in an excavator bucket a hazard. The CO described the hazards of this practice as being ejected from the bucket as it moves or being sprayed with hot hydraulic fluid if the hydraulic lines rupture, either of which could result in serious injury. (Tr. 111-113, 129-30). Mr. Jesse agreed that riding in a bucket is a recognized hazard in the construction industry and that Landers' safety rules specifically prohibit the practice.[8] (Tr. 147-49).

In view of the foregoing, the Secretary has established the elements of a section 5(a)(1) violation. This citation item is therefore affirmed as a serious violation. I find that the proposed penalty of $2,500.00 is appropriate, and it is accordingly assessed.

ORDER

Based upon the foregoing decision, the disposition of the citation items, and the penalties assessed, is as follows:

Citation 1	**Violation**	**Disposition**	**Classification**	**Penalty**
Item 1	§ 5(a)(1)	Affirmed	Serious	$2,500.00
Citation 2	**Violation**	**Disposition**	**Classification**	**Penalty**
Item 1	1926.652(a)(1)	Affirmed	Willful	$55,000.00

/s/
G. Marvin Bober
Administrative Law Judge

[8]Rule 20 of C-39 states that "[r]iding on steps, catwalks, decks, bumpers or in buckets, dump bodies or pick-up beds is forbidden.

Dated: January 24, 2000
Washington, D.C.