



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

One Lafayette Centre
1120 20th Street, N.W. — 9th 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.

A. R. BUTLER CONSTRUCTION CO.,
Respondent.

Docket No. 91-0228

ORDER

This matter is before the Commission on a direction for review entered by Chairman Edwin G. Foulke, Jr. on July 6, 1992. 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 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 in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).


Edwin G. Foulke, Jr.
Chairman


Velma Montoya
Commissioner

Dated July 16, 1993



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE
COM (404) 347-4197
FTS 257-4086

FAX
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR,

Complainant,

v.

A. R. BUTLER CONSTRUCTION
COMPANY, INC.,

Respondent.

OSHRC Docket No. 91-288

APPEARANCES:

Cynthia-Welch Brown, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Richard W. Lewis, Esquire
Thomas R. Elliott, Esquire
London, Yancey & Elliott
Birmingham, Alabama
For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

A. R. Butler Construction Company, Inc. ("Butler"), a trenching and excavating contractor, contests alleged willful violations of 29 C.F.R. § 1926.651(c)(2), for failure to provide a ladder or other means of egress from a trench, and 29 C.F.R. § 1926.652(a)(1), for failure to provide an adequate protection system for employees working inside the trench. In addition, Butler contests an "other" violation of 29 C.F.R. § 1926.59(e)(1), for failure to have a written hazard communication program on the site.

Compliance Officer Villeta Linton, while conducting an inspection in Cullman, Alabama, on November 27, 1990, received a telephone call from her supervisor (Tr. 9). The supervisor had received an imminent danger complaint concerning an excavation taking place in Flint City, Alabama (Tr. 10). She was told to curtail her present inspection and proceed to Flint City.

As Linton arrived at the new site, she could see the top of a hard hat in the trench (Tr. 11). She parked her car, walked to the trench, and introduced herself to two gentlemen, one of which was Alfred Butler ("A. Butler"), the owner. Butler was installing a gravity sewer line adjacent to Highway 31, Flint City, Alabama (Tr. 10, 97). According to Linton, A. Butler admitted that he had employees working in the trench without providing any protection (Tr. 11).

Linton held a brief opening conference, walked over and observed the trench, interviewed a few employees, and took some measurements (Tr. 11). As a result of the inspection, the Secretary issued a willful and "other" citations on December 19, 1990, which are the subject of this contest.

The measurements of the trench are not disputed. Linton measured the width of the trench with a tape measure and walked off the length of the trench. She testified that the width at the top was 6 feet and the length was between 25 feet and 30 feet. She did not measure the depth or the width at the bottom of the trench. She testified that A. Butler and Jim Dunlea, the superintendent at the site, told her that the depth was between 8½ feet to 9 feet and that the width at the bottom was 30 inches to 35 inches (Tr. 13-14).

When Linton arrived at the site around 1:00 p.m., A. Butler was present. The superintendent was not at the site but returned while the inspection was in progress. A. Butler testified that he arrived at the site on November 27, 1990, between 12:30 p.m. and 1:00 p.m. That was his first visit to the site on this date (Tr. 157). The superintendent had already departed (Tr. 147-148). Dunlea testified that he left the site between 12:15 p.m. and 12:30 p.m. and that four joints of 13-foot pipe had been laid prior to his departure (Tr. 101-102). A. Butler testified that there was no one working in the trench when he arrived

(Tr. 148). According to him, Linton drove up 15 to 20 minutes subsequent to his arrival (Tr. 148). When she arrived, A. Butler testified that they were digging in the trench (Tr. 148). The trench had utility lines on each side roughly 4 feet to 4½ feet deep (Tr. 77-78). The trench below that depth was only wide enough to get the backhoe buckets in at the bottom (Exhs. C-3, C-6).

Linton based her determination of soil type on statements made to her by A. Butler and Dunlea during the inspection and on her field tests of the soil (Tr. 18, 86). She found that the soil samples crumbled easily. This indicated that the soil was “very weak” and lacked cohesive properties (Tr. 18). Dunlea admitted that he told Linton that the trench was composed of a C-type soil (Tr. 25, 131). During his testimony, he changed his opinion. He testified that after removing the backfilled material, the trench was in cohesive type B soil (Tr. 130). He explained the discrepancies in his characterizations of the soil and in his testimony by saying, “Well, that was my nonfamiliarity with it, with the regulations; that I didn’t interpret it that I could tell her that we had the two different situations there” (Tr. 130). Dunlea’s credibility and/or judgment are called into question by his ignorance of the regulations. Linton’s observations, field tests, and Dunlea’s testimony support the conclusion that the trench was in sandy type C soil. Dunlea admitted that the first part of the trench was composed of type C soil. The Commission has held that a trench wall composed of soils of differing strengths is only as stable as the weakest component. *CCI, Inc.*, 9 BNA OSHC 1168, 1981 CCH OSHD ¶ 25,091 (No. 76-1228, 1980).

In order to establish a violation of the cited standards, the Secretary must show by a preponderance of the evidence for each of the violations that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *See, e.g., Trumid Construction Co.*, 14 BNA OSHC 1784, 1788, 1990 CCH OSHD ¶ 29,078, p. 38,859 (No. 86-1138, 1990).

WILLFUL CITATION

Item 1 - Alleged Violation of 29 C.F.R. § 1926.651(c)(2)

The Secretary alleges that a ladder or means of egress was not available on the jobsite, and employees were climbing up and down the north end of the trench. Section 1926.651(c)(2) provides:

(2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62 m) of lateral travel for employees.

Linton arrived at the jobsite at 1:00 p.m. on November 27, 1990 (Tr. 77). As she drove past the site to park her car, she observed what she assumed was an employee in the north end of the trench. Only his hard hat was visible from her car (Tr. 11, 46). Linton did not observe the individual exit the trench nor did she observe any employees in or exiting the trench throughout her inspection (Tr. 15-16, 47). When Linton got out of her car, Butler was digging in the trench and she did not observe any pipe being laid during the inspection (Tr. 55).

In obvious reference to the hard hat observed by Linton, A. Butler testified that before Linton arrived he observed an employee named Ira standing on the northern end of the ramp (Tr. 148-149). According to him, Ira was standing on the ramp at a depth of approximately 4½ feet deep (Tr. 149). Ira's head and hard hat were visible to A. Butler (Tr. 149). A. Butler further testified that Ira walked out of the ramp in an upright position (Tr. 149). According to A. Butler, there was no reason for Ira to be on the ramp.

Butler contends that since Linton did not take any measurements of the ramp, observe anyone either exiting or entering the ramp, photograph the length or slope of the ramp or physically test the ramp herself, the only basis for the alleged violation was her personal observation (Tr. 49).

Exposure is established by the admission of A. Butler and the admission by Dunlea that four joints of 13-foot pipe had been laid that morning (Tr. 101-102). Dunlea

acknowledged that it was necessary for an employee to perform certain functions in the trench (Tr. 107-108). The only attempt made to protect employees was inadequate sloping (Tr. 103-105, 130). The trench was only 6 feet in width at the top. Butler acknowledged that employees used the ramp to enter and exit the trench.

The photographs and testimony show that the north end of the trench was backfilled. Linton did not consider the north end an earthen ramp because, in her opinion, the angle of the ramp was too steep. The pre-disturbed soil was unstable and would prevent the ramp from giving good footing (Tr. 16-17, 19). Linton did not measure the length of the slope, the angle of the slope nor were any measurements taken in the backfill area (Tr. 48-49). She did not physically step on the ramp, test the footing or sample the dirt on the earthen ramp (Tr. 50).

Butler contends that the backfilled north end of the trench had a slope of one to one. This contention is not based on any measurements but on Dunlea's judgment "just knowing dirt" (Tr. 119). The photographs, particularly Exhibits C-2 and C-3, refute Butler's contentions. The exhibits clearly depict the steepness of the north end. The ramp has a very small angle. It is almost vertical. While Butler contends that no photographs were taken directly of the angle of the ramp, if it thought the Secretary's photographs were a distortion, it could have made photographs of its own. It was aware after the inspection that this was an issue raised by Linton.

As president of the corporation, Alfred Butler has an interest in the favorable outcome of this matter. The instability of the soil, the fact that it crumbled easily, and the steepness of the angle of the north end, as depicted in Exhibits C-2, C-3, C-8 and C-9, all support Linton's conclusion that the north end of the trench did not provide an adequate means of egress. The allegation is affirmed.

The reason for requiring a means of egress is to afford employees a safe exit from the excavation in the event of an emergency such as a cave-in. If such an emergency were to occur and employees could not exit, they could be severely injured or killed.

Item 2 - Alleged Violation of 29 C.F.R. § 1926.652(a)(1)

The Secretary alleged that employees working inside the trench laying a gravity sewer line were not protected from the possibility of a cave-in. Section 1926.652(a)(1) provides:

(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 except when:

Butler contends that it had no employees exposed to the condition observed by Linton.

The Secretary relies upon the testimony of Linton to establish exposure of employees. She testified that as she drove past the site, turned around and came back to the site. On her return to the site, she saw the top of a hard hat from her car. She noticed the hard hat in the area of the trench as she passed the site to turn into a side street (Tr. 4, 11, 32, 44, 46). After she parked and walked to the site, she introduced herself to two gentlemen, one of which was Alfred Butler, the owner. She states that she asked him if he had employees working in the trench excavation without any protection. According to her testimony, Butler said, "Yes" (Tr. 11). Later, she testified that Butler informed her that two employees had been in and out of the trench that day (Tr. 33). She elaborates as follows on Butler's admission (Tr. 33):

Q. Did you ask Mr. Butler how he was protecting them?

A. Yes.

He said there was no protection. He said that I had caught him at an inopportune time.

And, I asked him if he had consciously put his employees in the trench without protection. And, he said, Yes," he did not consciously want them hurt, but he put them in the trench without protection knowingly.

Alfred Butler denied making any such statement (Tr. 153, 159, 161-164). Although Linton noticed the top of a hard hat as she glanced at the trench while driving past it, she testified

that she saw no one exit the trench. She stated that she saw the hard hat between the middle and the north end of the trench (Tr. 46).

Butler's first appearance at the site that day occurred a few minutes before Linton arrived. Dunlea left the site around 12:15 p.m. to 12:30 p.m. The crew had laid four 13-foot joints that morning. There is no dispute, according to Dunlea's testimony, that employees had worked in the trench that morning. Butler argues that Alfred Butler was not aware of the conditions of the job before his arrival. Since by his own acknowledgement he talks to Dunlea every morning, he undoubtedly was aware of whether the trench was protected against a cave-in. He testified (Tr. 151):

I talked to Jim every morning about the job about 6:00 or 6:30 in the morning. We usually talk every morning whether they're in Flint or in Birmingham and ask him what was going on.

In any event, he had been on site long enough before Linton arrived to become knowledgeable about the morning's activities.

Alfred Butler's testimony dwells on what transpired after he was at the site. When he arrived at the site, the backhoe operator was in the process of excavating the trench to get it to grade. A. Butler and Dunlea testified that there was no reason to have an employee in the trench until it was dug to grade. The reference to exposure by Linton pertained to the laying of the four joints prior to Dunlea's departure from the site around 12:15 p.m. to 12:30 p.m. Linton could obviously observe that no one was in the trench while she was present at the site.

Linton's testimony is deemed credible. Alfred Butler's testimony is not fully supported by the credible evidence. Linton testified that as she arrived at the work site, she saw the top of a hard hat between the middle and north end of the trench (Tr. 46). Butler informed her that two of his employees had been in and out of the unprotected trench that day and that she had "caught him at an inopportune time" (Tr. 28, 33). While A. Butler denied having made any such statement (Tr. 102), he admitted that he observed an employee standing on the ramp and then walking out of the trench (Tr. 148-149). He offered no reason as to why the employee was on the ramp (Tr. 149, 153).

In any event, exposure is supported by Dunlea's testimony. He testified that prior to his departure, the crew had laid four joints (Tr. 101-104). According to Dunlea, when the trench exceeded 5 feet, sloping was the only protective measure undertaken by him (Tr. 102-104). He acknowledged that it was necessary for an employee to get in the trench to connect the pipe (Tr. 107-108).

Butler contends it did not violate § 1926.652(a)(1) because it sloped as required by the standard. Dunlea testified about the manner in which he sloped the sides of the trench. He and the two foremen on the job were responsible for evaluating the soil conditions and deciding what protective measures to take (Tr. 126). When the depth of the trench exceeded 5 feet, they began to slope back from the phone cable, which was consistently 4 to 4½ feet below the top of the trench (Tr. 103-104). The method of sloping is best described in the following colloquy between Dunlea and Butler's counsel (Tr. 104-105):

- Q. And, then as you got deeper, how far from the phone cable would you have gotten? In other words, were you sloping from the very bottom of the cut, or were you sloping from x number of feet from the bottom and then sloping out?
- A. Well, it varied. As we got deeper and the phone cable was coming up with the lay of the land, the vertical portion of the trench was getting deeper, but we consistently sloped, exposed the phone cable, and then sloped back from the top of the phone cable back on a one-to-one on both sides of the trench.

On cross-examination, Dunlea made it clear that he was not sloping from the bottom of the trench (Tr. 130).

Dunlea testified that he was familiar with the diagrams in the appendix to the standard. He explained that he understood that in layered soil with type C over type B, the bottom (type B) portion would be sloped one to one while the upper (type C) portion would be sloped one and one-half to one (Tr. 142). He stated that the bottom 3½ feet of the trench could be vertical (Tr. 143). After testifying about the requirements for layered soil, Dunlea stated that they removed the portion of the trench that was of type C soil. The remainder of the trench was composed of type B soil. The following exchange took place on re-cross examination (Tr. 144-145):

A. Well, I was interpreting it as in B type material, which I thought I was in B type material once I had excavated the C material.

Q. I see. So, what you're saying is that in sloping, you were treating it as a B type soil?

A. From top to bottom, yes.

As the Secretary aptly notes, Dunlea's interpretation of the applicable regulations is novel at best.

Dunlea's "unfamiliarity" with the regulations is apparent from his testimony. In addition to misinterpreting the standard, he did not comply with his own misinterpretation. Dunlea's claim that he was experienced in trenching is refuted by his own testimony (Tr. 131). Linton's conclusion that the trench was dug in type C soil and, therefore, should have been sloped one and one-half to one is more credible.

The standard requires that employees be protected from cave-ins by either sloping and benching systems or by support systems, shield systems, or other protective systems. Butler had a trench box on site but was unable to use it in that portion of the trench in question because there was not sufficient room between the two existing utility lines (Tr. 30). Since the trench was dug in type C soil, the width of the top of the trench should have been 27 feet in order to comply with the one and one-half horizontal to one vertical required by the standard (Tr. 30; Fig. B-1.3, Subpart P, Appendix B). The sloping of the trench was not in compliance with the standard since its width was only 6 feet. The violation has been established.

Employees were in the trench. There can be no serious disagreement over the fact that unprotected sides of a 8½- to 9-foot deep trench presents a serious violation. In the event of a cave-in, they were exposed to serious injury or death.

WILLFULNESS

The Secretary classifies the violations of §§ 1926.651(c)(2) and 1926.652(a)(1) as willful. A willful violation is different from other types of violations. It is distinguished by

a heightened sense of awareness. The violation is committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *E.g., Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987).

Butler was familiar with the requirements of the standards. It had been cited for similar violations in the past. It was cited for serious violations of § 1926.652(h) (unsafe egress) and § 1926.652(b) (unprotected trench) in March, 1987 (Exh. C-12). In July, 1987, Butler was cited for a serious violation of § 1926.652(b) (Exh. C-13). Previous violations of the same standard are evidence of the employer's familiarity with the standard's requirements. *D. A. & L. Caruso, Inc.*, 9 BNA OSHC 1987, 1984 CCH OSHD ¶ 26,985 (No. 79-5676, 1984).

Dunlea had attended a conference held by the Association of General Contractors ("AGC") on the new excavation standards (Tr. 131). A. Butler told Linton that he was very familiar with the OSHA requirements and that he, too, had attended the AGC conference (Tr. 25-26). According to Linton, A. Butler also stated that he had consciously put his employees into the trench without protection, but he did not want them hurt (Tr. 33). He told her that "he knew that the violations appeared willful, but he did not intend to get anyone hurt out on the job site" (Tr. 40).

Butler was aware of the dangerous nature of trenches; yet, it failed to make a good faith effort to comply with the standards. The standards give an employer several options to make an excavation safe. The evidence established that Butler knowingly proceeded without protecting the sides of the trench from a cave-in.

Butler argues that A. Butler and Dunlea had a good faith opinion that the sloping was in compliance with the standard. A violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the standard. The test of 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. *Id.* 13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591.

The evidence establishes that Butler consciously disregarded the requirements of the standards. A. Butler and Dunlea had both attended a conference held by AGC regarding

the new excavation standards. They both indicated to Linton they were familiar with the new trenching standards. Butler has also received several citations in the past concerning trenching violations. Given the state of knowledge of Dunlea and A. Butler, they could not have reasonably determined that the small amount of sloping undertaken by Dunlea was adequate to comply with the Act. In addition, the ramp was steep enough that they should have recognized the inability of an employee to walk upright and exit the trench. Butler candidly admitted to the compliance officer that employees were placed in an unprotected position in the trench. Although he may not have permitted the violations intentionally to endanger the employees, Dunlea certainly ignored the requirements of the standards.

The violations are affirmed as willful violations.

NONSERIOUS CITATION

Alleged Violation of 29 C.F.R. § 1926.59(e)(1)

The Secretary alleges that Butler had not developed or implemented a written hazard communication program as required by § 1926.59(e)(1). This standard provides:

(e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

Butler did not have a list of all chemicals known to be present at the site or a written description on how the criteria specified for labels and employee training would be satisfied (Tr. 38, 70).

Butler concedes a technical violation. It had no written program, but states that it had trained all employees, possessed all of the data sheets on all chemicals used at the site, held safety meetings, labeled the chemicals, and did everything but write the program. It submits that it has complied with the spirit, if not the letter, of the standards. It requests that the violation be vacated on this basis.

The Secretary concedes that Butler did have the material safety data sheets for the chemicals available and that employees had been trained; however, a violation must be determined. Butler did not fully comply with the standard. There was no written hazard communication program.

Where a violation has no direct or immediate relationship to employee safety and health, the Commission has authority to classify a violation as *de minimis*. See *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1991 CCH OSHD ¶ 29,498 (No. 89-2253, 1991), wherein the Commission granted the Secretary's motion to amend to allege a *de minimis* violation of § 1926.59(e)(1) in the absence of a written program at the site. The program was written and employees had been properly trained. The rationale is not applied to this case since a written plan has not been prepared even though employees had been trained. A *de minimis* classification is "reserved for those unusual situations where the hazard is so trifling that an abatement order would not significantly promote the objective of employee safety." *Turner Co.*, 4 BNA OSHC 1554, 1564, 1976-77 CCH OSHD ¶ 19,343 (No. 3635, 1976). The written program is part of the standard and is considered a necessary part of the standard to insure enforcement. The program needs to be in writing. This violation is affirmed as nonserious.

PENALTY DETERMINATION

While penalties were proposed by the Secretary, the Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

Butler is a small employer. At the time of the inspection, it had only one job which was the one in Flint City, Alabama. He has received several citations in the past. There is no evidence to indicate that they did not cooperate during the inspection. The gravity of the violations must be considered serious. The trench was 8½ to 9 feet deep. In the event of a cave-in, it is certain that the two employees would have suffered serious injury or death. The penalty must also take into account the fact that these were willful violations. Accordingly, a penalty of \$6,000 is assessed and is considered appropriate for each of the two willful violations. No penalty is assessed for the violation of § 1926.59(e)(1).

FINDINGS OF FACT AND
AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

In view of the foregoing, and good cause appearing in support of the determinations, it is

ORDERED: (1) That the willful citation issued to Butler on December 19, 1990, is affirmed and a penalty of \$6,000 assessed for each of the violations; and

(2) That the "other" citation issued to Butler on December 19, 1990, is affirmed.



JAMES D. BURROUGHS
Judge

Date: May 26, 1992