COMMONWEALTH OF LABOR
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2475-93

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

CUNDIFF CONSTRUCTION, CO., INC. — RESPONDENT

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DECISION AND ORDER
OF THIS REVIEW COMMISSION

This case comes to us on respondent Cundiff Construction's petition for discretionary review (PDR)[1] of the recommended order entered by our hearing officer on August 23, 1995. We granted review; both parties submitted briefs.

This commission is a creature of KRS 338.071 (4) which charges us with the duty to hear and rule on appeals from citations. Our hearing officers submit their recommended orders to us (ROP 47) which we may accept or reject as we see fit.

Complainant secretary of labor issued a willful citation with eight items to respondent, dealing primarily with the trenching standards, following an inspection of a Cundiff construction job. Cundiff employees worked at the Ford plant on Fern Valley Road in Louisville in an excavation about 25 feet square. Each item received a recommended penalty of $21,000.[2] Labor also issued one

[1] Section 48 of our rules of procedure (ROP) enacted as 803 KAR 50:010.

[2] KRS 338.991 (6) grants this commission the authority to modify all penalties proposed by the secretary of labor.

serious citation with a penalty of $1,500 for not installing seat belts on a backhoe and a nonserious citation. Total proposed penalties came to $169,500.

Our hearing officer, in her recommended order, sustained all citations and penalties. Because Cundiff Construction limited its PDR to the 8 willful citations, the serious and nonserious citations are now final orders of this commission. ROP 47 (3).

Susan Draper, compliance office for the secretary of labor,[3] began her inspection of Cundiff's worksite at the Ford plant on November 5, 1993. Labor knew of the excavation work because of a news media "referral." Transcript of the evidence (TE) 5. She observed several Cundiff employees working in the excavation and even took a photograph of foreman Stengle exiting the trench. Complainant's exhibit 1(b) and 4. The excavation was approximately 12 feet deep (TE 18) and situated 20 feet from one railroad track and 70 feet from another. TE 16. According to Ms. Draper the railroad track 20 feet from the excavation had been "spiked" to prevent its use while the work continued. TE 55. Plywood forms (erected in the excavation by Cundiff) into which concrete would be poured, converted the excavation into a trench. TE 147-148. Section (b) of 29 Code of Federal Regulations (CFR) 1926.650[4] says a trench is narrower than its depth.

We shall discuss each willful item in sequence, postponing

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[3] The secretary of labor enforces the Kentucky occupational safety and health act. KRS chapter 338.

[4] Adopted in Kentucky by 803 KAR 2:415.

items 1 and 6 until the last for reasons which will become clear.

Item 2 charges Cundiff with not providing a ladder (or other means of egress) as a safe exit from the trench, a violation of 1926.651 (c) (2). Complainant's exhibits 1 and 1 (a) show two sections of a ladder but these ladders are within a plywood form erected by Cundiff and, we find, not available for use by employees to get in and out of the trench. TE 37. If the two ladder sections had been joined together and placed where it could be used, that would have been an acceptable means of entering and exiting. TE 94.

At the beginning of the hearing, the parties referred to the transcript of a Cundiff case tried in February of 1994. In that earlier case, KOSHRC 2413-93, the same parties litigated citations issued against Cundiff for trenching violations which caused the death of a Cundiff employee. Although the parties did not specifically say so, we infer they intended to incorporate the earlier transcript and exhibits into the present case by reference. TE 8.

In the first case respondent introduced into evidence a document discussing proper trenching techniques. February 1994 hearing, respondent's 1. Respondent came into possession of this document about one week before the inspection in this case, November 5, 1993. TE 211-212.

Secretary's exhibit 1 (b) shows foreman Stengle climbing up the side of the trench and out while secretary's exhibit 4 shows the same man standing on top of a muddy concrete pipe. To the

man's right is the beginning of the incline leading out of the trench and behind and below him rebar steel (used to reinforce concrete) pointing straight up. Secretary's exhibit 2 shows the rebar steel next to the concrete pipe and secretary's exhibit 12 shows the proximity of the pipe, the rebar steel which was 2 1/2 to 3 feet in length and the mud ramp leading out of the trench. TE 143. The compliance officer (CO) testified the point where the foreman walked out of the trench would not qualify as an exit ramp according to 1926.651 (c). TE 171. See "ramp," the definitions section of 1926.650 (b). We find this to be true, given the above evidence.

Because the company did not provide a ladder or approved ramp for exiting the trench, we conclude the company violated 1926.651 (c) (2). Obviously, if an employee slipped climbing in or out of the trench where foreman Stengle was photographed, he could fall off the muddy concrete pipe and onto the rebar steel. Without more, the violation would qualify as a serious violation because of possible impalement. KRS 338.991 (11).

The issue then is whether the violation was willful?

This commission in Louisville Gas and Electric Company, KOSHRC 1729-88, adopted the federal majority rule on the definition of a willful violation. That rule found in Empire Detroit Steel Division, Detroit Steel Corp v. Occupational Safety and Health Review Commission and F. Ray Marshall, Secretary of Labor[5], 579

[5] As a state program we need not regard federal OSHA cases as precedent but we often find them persuasive as we do here.

F.2d 378, 384 (6th cir. 1978), CCH OSHD 22,813, says:

> Willful means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision is described as willful, 'regardless of venial motive.'

The LG&E case, above, goes on to say:

> It is not necessary to prove that the employer has actual knowledge of the specific standard it is alleged to have violated. It is sufficient if it is proven the employer is aware of the danger of serious injury or death to the employee and acts in conscious disregard of the danger.
> (emphasis added)

Cundiff, a week before Ms. Draper's November 5, 1993 inspection, received some trenching information which advised the company that ladders "must" be used for exit when trenching deeper than four feet. February 1994 hearing, respondent's exhibit 1. We find Mr. Stengle, the foreman, was Cundiff's "competent person" at the job site. TE 214 and 1926.651 (k) (1). It was his responsibility see to it the company followed safe trenching practices on a daily basis. The rebar next to the concrete pipe (not capped in any way to prevent an employee being impaled on it in the event of a fall) had been in place at least 24 hours. TE 79-80.

We find the dirt ramp leading up from the concrete pipe, used as an exit by employees, subjected them to the risk of falling on the pipe or the rebar steel. As the foreman and competent person at the worksite, Mr. Stengle knew ladders must be used below four feet because of respondent's exhibit 1 (first case), knew the employees used the dirt wall as an exit ramp and knew about the rebar steel next to the pipe and we so find. Mr. Stengle's

knowledge may be imputed to the company. Central Soya de Porta Rico v. Secretary of Labor, 653 F.2d 38 (1st cir. 1981), CCH OSHD 25,522. After all, it was William Cundiff, Jr., company vice president, who testified Mr. Stengle was the "competent person" under 1926.651 (k) (1). TE 214. Jim Knight, a former employee of Cundiff who worked on November 5, 1993, testified that Bill Hettinger, company superintendent, came out every day to inspect the job site. TE 180.

Because the company had been warned about using ladders in trenches deeper than four feet and because the company, through its competent person, knew about the dangerous situation presented when employees exited the trench, we conclude the company willfully violated 1926.651 (c) (2). KRS 338.991 (1). The company knew about the threat to employee safety but did nothing.

General counsel Rex Hunt in his brief to the hearing officer (p. 3) withdrew item 3. The secretary of labor may withdraw citations at any point in the litigation process before this commission. The secretary is charged with enforcement of Kentucky's occupational safety and health act. KRS 338.101 and 338.141.

Item 4 charges Cundiff with permitting their employees to work in the excavation without hard hats. Section 1926.651 (j) (1), the cited standard, reads:

> Adequate protection shall be provided to protect employees from lose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to

stop and contain falling material; or other means that provide equivalent protection. (emphasis added)

Our dictionary says scaling means "to remove in layers..."[6] So the regulation says an employer, to protect against rock or soil from falling off the face of the excavation, may scale back the face, erect a barrier or use some equivalent protection. We assume the secretary sees hard hats as "equivalent protection." The secretary's inspector testified there was no regulation in Kentucky requiring the wearing of hard hats in excavations. TE 106. True, but that ignores 1926.100 which among other things says hard hats are necessary whenever there is a possibility of injury from falling objects. As CO Draper testified, the lack of hard hats was labor's only justification for the citation. TE 46-51.

Standard[7] 1926.651 (j) (1) speaks to the removal of material from the face of the excavation or barriers placed on the face of the excavation. As the drafters of the standard intended, scaling and barriers are both designed to prevent material from falling from the face of the trench wall. We presume that equivalent protection would also, in some way, prevent material from falling off the face of the wall and onto employees. That is how the standard reads to us and most likely employers as well.

This regulation, on its face, does not put the employer on notice that hard hats are required when employees work in excavations. One of the principal tenets of American law is a

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[6] Webster's II, New Riverside University Dictionary, 1984.

[7] We use the terms standard and regulation interchangeably.

person charged with a civil infraction must have some notice of what the law requires. Section 2, Constitution of Kentucky. There is nothing in the standard to let an employer know he is liable for not putting his people in hard hats in trenches. An agency's interpretation of a regulation is only valid if it "...complies with the actual language of the regulation." Hagan v. Farris, Ky., 807 S.W.2d 488, 490 (1991). We dismiss item 4 since the cited regulation does not put Kentucky employers on notice hard hats are required when employees work in trenches.

Item 5 charges Cundiff with violating 1926.651 (j) (2) which requires employers to protect against objects falling into trenches by keeping materials "at least 2 feet" from the edge or using retaining devices. In the citation, reference is made to a Komatsu track hoe. We find all testimony indicated the track hoe was at least two feet from the edge if not three. TE 52. Despite the compliance officer's protestations to the contrary, 1926.651 (j) (2) contains no exception to the two foot requirement for very heavy objects so we exclude the track hoe from the citation from the outset. Hagan v. Farris, supra. Here again, a person must have some notice what is required of him and the standard does not require any more than 2 feet, which Cundiff exceeded.

As to the cited spoil pile, the compliance officer refers us to a photograph (secretary's exhibit 7) which does show a spoil pile. But the photo reveals the pile to be back some indeterminate length from the edge of the excavation with a shallow slope away from the edge of the trench. Further, all the compliance officer

can say is "...the pile was placed too close to the edge." TE 56. She did not measure the distance. TE 117. Since proving that objects are less than two feet from the edge of the excavation is an element which must be proven to sustain a citation under this standard, and that was not done, we dismiss item 5.

Next we take up item 7. Here labor said there was no protection against cave ins. 1926.652 (a) (1). The citation says an employer may protect its employees working in an excavation by using shoring boards or trench boxes or by sloping of the walls of the trench.

This, like the others, is a willful citation. On the subject of willful trenching violations, P.A. Landers, CCH OSHD 30,846, dealt with a contractor charged with failing to properly slope an excavation. The foreman got an estimate from a civil engineer who told him the soil did not need sloping. The federal review commission reduced the willful to serious. Basically, Landers says its not a willful violation if the company believes it is doing the right thing - whether it is or not. As we stated in the LG&E case, supra, a willful violation will be upheld if the employer "...acts in conscious disregard of the danger." Thus the focus for item 7 is whether Cundiff Construction disregarded the danger presented to employees working in the excavation? In other words, did the company do anything to prevent a cave in? Here is what the proof in this case, as we find it, shows about the condition of the four walls of the excavation.

One side of the four-sided trench was protected by a concrete

wall installed some time prior to excavation. Secretary's exhibit 1. While respondent did not create this concrete wall, its existence does foreclose the possibility the trench at that point might fail.

A second wall had a backhoe placed against the wall at the bottom to prevent cave ins. This was the subject of repeated testimony by the compliance officer and Jim Knight.. TE 18, 54, 66, 166 and 178 and secretary's exhibit 8. Even the standards suggest that should a trench wall give way, the collapse begins at the bottom of the wall. See "Distress" in the definitions section of Appendix B (b) which follows 1926.652. From the testimony in this case and the definition we find the backhoe, while not in compliance with the cited standard, was placed at the bottom of the wall in a misguided attempt to prevent a cave in.

A photograph of a third wall (where foreman Stengle climbed out of the trench) shows one level of benching[8]. Secretary's exhibit 1 (a). The picture shows lumber leaning up against the bench. Then there is some gravel on a flat surface and then the trench wall slopes off to the right toward the top of the wall.

Ms. Draper, the compliance officer, testified the slope of one wall, using a protractor seen in secretary's exhibit 10, measured approximately 36 degrees (TE 123) and that 34 degrees would be sufficient sloping under the standard, (TE 170), not enough to avoid a citation but some sloping indeed.

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[8] Benching is the setting back of a trench wall much like a stair step. See appendix B following 1926.652.

Thus, we find the record contains several examples of efforts by Cundiff to prevent cave ins at the excavation site. As there was no shoring of the trench walls, the sloping was inadequate and a backhoe shovel is not shoring or bracing under the standards, the company violated 1926.652 (a) (1). But because the company did not completely disregard the safety of their employees working in the excavation, we conclude the violation was not willful.

What are we left with then? As with the other willful citations, Ms. Draper figured the penalty by first calculating a serious penalty of $5,000. TE 77. As she said earlier in the trial "Penalties for a willful are calculated as you would for a regular serious violation; and, then, they are multiplied by a willful factor of seven." TE 39.

Pleadings in Kentucky, be they civil or administrative[9], may be amended to conform to the proof. CR 15.02 and Nucor Corp. v. General Electric Co., Ky. 812 S.W.2d 136 (1991). In Dye Construction Co., CCH OSHD 22,810, a federal review commission case, the secretary attempted to prove a willful violation by first proving its seriousness, to which respondent vigorously objected. Nevertheless, in Dye the review commission amended the willful violation to serious since respondent's objection was to the compliance officer's qualifications to predict injuries not to the serious classification of the violation itself. The review commission in Dye then held that a willful violation may be amended

[9] Kentucky's civil rules are made applicable to proceedings before the review commission by ROP 4 (2).

to nonserious under FRCP 15 (b)[10] but to a serious citation only if the parties have consented to the trial of the seriousness issue.

In the case at bar the secretary's witness testified to the seriousness of each willful citation as the basis for establishing a willful penalty. After determining the gravity based penalty of $5,000 for each willful citation, the compliance officer testified it would be reduced by 40% for company size to a $3,000 serious penalty. Then a willful factor of 7 is used to increase the $3,000 to $21,000. TE 39. At no time did respondent object to classifying the willful violation as serious. We infer, then, both parties consented (the secretary directly and Cundiff impliedly) to the trial of the willful items as serious violations. Labor, in effect, made a serious citation the basis for the willful; we are simply reversing the process based on the facts proven. We hold that when the secretary uses the serious penalty structure to fix a penalty in a willful violation case without objection from the respondent, the willful violation is serious should the willful case fail. CR 15.02.

We further conclude item 7 is a serious violation with a penalty of $3,000. The compliance officer found the trenching violation presented a serious hazard to employees, that being failure of a trench wall, and so do we.

Item 8 says rebar steel (seen in photographs introduced into evidence as secretary's 2 and 4) was not guarded to prevent

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[10] Similar to CR 15.02.

impalement should an employee fall on top of it. 1926.701 (b). Standards say the rebar should be covered in some way and the photographs reveal nothing was done. Here labor charged willful because the company had distributed the unfortunately titled "fatal facts" document to Cundiff employees before the fatality case earlier in 1993. See February 1994 hearing, secretary's exhibit 15. The photographs disclose the rebar steel was not covered as required by the standard. It had been in place for at least one day. TE 79-80. We see item 8 as a companion to item 2 which we upheld as a willful violation because they are related in terms of the hazard presented to employees. When an employee climbed up the side of the trench, for which the company was cited in item 2, he subjected himself to falling on the concrete pipe below and the uncovered rebar steel beneath that. As with item 2, foreman Stengle was the competent person responsible for employee safety at the excavation site. The company had "fatal facts" before the November 5, 1993 inspection and so knew about the hazards associated with uncovered rebar steel. "Fatal facts" even cites to 1926.701 (b). Since we have already held that foreman Stengle's knowledge of the juxtaposition of the trench wall, the concrete pipe and the uncovered rebar steel may be imputed to the company, we conclude the company violated 1926.701 (b) and that the violation was willful. See LG&E, supra.

Item 1 charges the company with not instructing employees in the safe performance of job tasks and excavation regulations. 1926.21 (b) (2). While this commission has determined the company

violated numerous standards, we infer there must have been some instruction. For example: the company had Fatal Facts (TE 27); the backhoe was parked 2 feet or more from the side of the excavation; there was a means of exit - not legal but an exit employees did use; item 3 on accumulating water was deleted by labor after the hearing; we dismissed item 4 because the secretary did not employ the proper hard hat standards; there was some cave-in protection but still a serious violation (item 7).

When you put this all together, the question is whether this item was willful or not; we conclude not. Because there were some attempts at compliance on several fronts, we reduce item 1 to serious with a $3,000 penalty. LG&E.

Item 6. Here the charge is no competent person inspected the excavation worksite each day. 1926.651 (k) (1). If you start with the premise that all the other cited willful violations are supportable, then there was no competent person present and the company is guilty of willful misconduct. But if some were not willful or were dismissed, perhaps this is not a willful violation - not unlike item 1 above. For the reasons stated for item 1 we conclude item 6 to be a serious violation with a penalty of $3,000.

Mr. Cundiff, Sr., testified a $168,000 penalty would bankrupt his company. TE 227. While this appears to raise a financial hardship defense, we have insufficient information upon which to make a judgment. We held in Fleming County Industries[11], KOSHRC NO. 2439-93, that proof of net income (after taxes) is necessary to

[11] Attached to this decision as appendix A.

establish whether the proposed penalty is indeed a financial hardship on the company. Kimmel Iron and Metal Co., Inc., CCH OSHD 22,368. Financial hardship (inability to pay the penalty out of current income) is an affirmative defense which must be plead to be relied upon by respondent. CR 8.03 through ROP 4 (2).

We affirm the hearing officer's recommended order to the extent it is consistent with this decision.

We affirm citation 1, items 2 and 8 as willful violations with penalties of $21,000 each. We affirm items 1, 6 and 7 as serious citations with penalties of $3,000 each and we dismiss items 3, 4 and 5.

If abatement has not already been accomplished by respondent, we order it within 30 days.

It is so ordered.

Entered March 5, 1996.

George R. Wagoner
Chairman

Charles E. Yates
Member

Donald A. Butler
Member