

SECRETARY OF LABOR,

Complainant,

v.

LAKELAND ENTERPRISES OF
RHINELANDER, INC., and its successors,

Respondent.

OSHRC DOCKET NO. 02-1909

APPEARANCES:

For the Complainant:

Lisa Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

John H. Zawadsky, Esq., Reinhart, Boerner, Van Deuren, SC, Madison, Wisconsin

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Lakeland Enterprises of Rhineland, Inc. (Lakeland), at all times relevant to this action was engaged in the excavation of portions of Business Park Avenue in Marshfield, Wisconsin, for the purpose of installing utilities. Lakeland admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 28, 2002 Compliance Officer (CO) Chad Greenwood, of the Occupational Safety and Health Administration (OSHA), conducted an inspection of the Marshfield excavation where Lakeland's employees were working. As a result of that inspection, Lakeland was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Lakeland brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 9-10, 2003, a hearing¹ was held in Milwaukee, Wisconsin. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

¹ The transcript does not clearly reflect the tender of Complainant's exhibits, C-29 through C-31. Complainant's Exh. C-29 is a copy of a soils report also tendered by Respondent as Exh. R-4. That exhibit was rejected (Tr. 15), as is Exh. C-29. Exhibits C-30 and C-31 are the curriculum vitae of Complainant's soils experts and are received.

CO Greenwood testified that as he approached Lakeland's work site on August 28, 2002, he observed and videotaped a backhoe excavating an 18 foot deep trench. The trench was located between two utilities, a water pipe and a storm sewer, which ran north/south, 8 feet under Business Park Avenue (Tr. 36-36, 40-41; Exh. C-1). A Lakeland employee, Tony Noth, was working at the bottom of the excavation (Tr. 32-33, 39, 65). Noth was standing atop a sanitary sewer that was 18 feet below street level (Tr. 39, 41, 47, 55, 74-76; Exh. C-2, pp. 2 through 4; C-15). Noth later told Greenwood that he was hand digging around the sewer pipe so that the backhoe operator would not break the line (Tr. 42-43, 65, *See also*, testimony of Ron Krueger, Tr. 261, 277-78). In a written statement provided after the inspection, Ron Krueger, the back hoe operator and part owner of Lakeland, admitted knowing about the violation, stating that he knew it was no excuse that Noth was only in the trench for a few minutes (Tr. 275; Exh. C-9). Greenwood watched as Noth dug a step into the north wall of the trench so that he could climb out of the trench (Tr. 42-43; Exh. C-1). There was no ladder in the excavation (Tr. 99).

Alleged Violation of §1926.651(c)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.651(c)(2): A stairway, ladder, ramp or other safe means of egress was not located in trench excavations that were 4 feet (1.22m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees:

A ladder was not used to enter and exit the excavation.

The cited standard provides:

A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.2 m) or more in depth so as to require not more than 25 feet (7.62 m) of lateral travel for employees.

Discussion

The record establishes that there was no ladder in the trench when Noth climbed down to dig around the sanitary sewer, or when he climbed out (Exh. C-1). Following the OSHA inspection, Noth received a one-day suspension for failing to use a proper means of egress (Tr. 77, 213, 273, 296; Exh. R-1). In its brief, Lakeland maintains that a ladder is required as a means of egress only if the employee cannot exit by walking out of the trench. Lakeland argues that because Noth walked up the north slope of the excavation without difficulty, there is no violation. There is no support anywhere for this position. The plain language requires a stair, ladder or ramp in trenches more than four feet deep. The violation is established.

In the alternative, Lakeland argues that any violation was the result of unpreventable employee misconduct.

Employee Misconduct. In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

Facts

Lakeland's safety program includes a rule requiring that ladders be used in excavations (Tr. 76-77, 211; Exh. C-16, R-13, ¶7.2.5). According to Lakeland, job box meetings are held at the job site every week (Tr. 76, 220, 255; Exh. R-16). Harry Butler, a consultant providing safety and health training for underground contractors, testified that he visited Lakeland's job sites, conducting safety audits of its operations (Tr. 238-39, 241). Butler testified that though he found no violations having to do with protective systems, though he noted some less serious violations, *i.e.*, a ladder which extended less than three feet from the top of a trench box, and failures to use vests or back-up alarms (Tr. 242). Butler testified that Lakeland had a progressive disciplinary program, and stated that he was authorized to issue written warnings for any safety violations he observed (Tr. 243; *see also*, testimony of CO Greenwood; Tr. 76). Lakeland's written disciplinary system provides that: first violations shall be corrected, and a written warning notice issued and placed in the employees personnel file; second violations shall be corrected, a written notice issued and the employee suspended for one to three days; third violations shall be corrected, a written notice issued, and the employee suspended or dismissed (Exh. R-13, ¶5-1). Gary Taylor testified that Lakeland employees are disciplined for safety infractions (Tr. 213). According to Taylor, employees receive mostly verbal warnings. Lakeland produced evidence of only one disciplinary action predating the August 28, 2002 inspection, a letter documenting a two-day suspension given to Wayne Condinger in 1998 for going into a trench without a trench box (Tr. 214-15; Exh. R-21). CO Greenwood, however, testified that the 1998 suspension was compelled by his inspection of Respondent's work site (Tr. 78). Gary Taylor testified that employee Andy Marks was also suspended at some point for working too close to overhead wires (Tr. 214), arguing that Mr. Mark's suspension was not related to any OSHA investigation (Tr. 215). Lakeland produced no documentation relating to Mr. Marks' suspension.

Noth testified that he received a copy of the company safety manual every year. He also stated that he had received safety training, and had been qualified as a “competent person”² (Tr. 291). When asked why he did not use a ladder in the excavation on August 28, 2002, he stated that “I just . . . thought he was getting too close to the pipe, and I was in a hurry and just ran down it quick.” (Tr. 296). Noth testified that he had never been disciplined prior to August 28 (Tr. 297). Noth had no personal knowledge of any other employee being suspended or getting a written warning in the five years he worked at Lakeland (Tr. 66, 291, 297).

As noted above, Lakeland’s back hoe operator, Ron Krueger, is also part owner of Lakeland (Exh. C-9, C-10). Krueger stated that the foreman, James Gust, was primarily responsible for safety violations on the work site (Tr. 289). Krueger, however, had been repeatedly trained as a competent person, and was also responsible for the safety of the workers on the site (Tr. 200, 255, 289; Exh. R-11, R11A, R-11H). Krueger testified that he did not instruct Noth to enter the excavation, and did not see him go in (Tr. 260). When he became aware of Noth’s location, however, he, inexplicably, did not instruct him to exit the excavation, but continued to operate the back hoe, digging out the nearly vertical north trench wall immediately to Noth’s left (Tr. 39, 44, 113, 275; Exh. C-1). Nor did Krueger make any attempt to provide Noth with a proper means of exiting the trench, though there was a ladder next to the trench, and two other employees in its vicinity at the time (Tr. 120). Despite what can only be described as acquiescence in Noth’s actions, Krueger signed Noth’s disciplinary letter (Exh. R-1).

In his written statement, James Gust stated that he had never disciplined anyone other than verbally (Exh. C-10).

Discussion

Lakeland had a work rule requiring that a ladder be provided for egress from excavations. However, it is clear from the evidence that Lakeland did not effectively enforce its work rules. On paper, Lakeland had a progressive disciplinary program, but it existed *only* on paper. Two documented suspensions were issued only when compelled by OSHA inspections. Lakeland produced no written reprimands, and in fact did not claim to have issued any, though, under Lakeland’s alleged disciplinary program, written reprimands are required for all safety violations. Supervisory and safety personnel claim

² 29 C.F.R. §1926.650 *Scope, Applications, and Definitions (Excavations)*. “Competent person” means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

to have routinely corrected violations verbally, though verbal reprimands are not an element of the written program. The Commission has held that a safety program actually consisting only of pre-inspection verbal warnings is insufficient to fulfill the employer's duty of effective enforcement. *Precast Services, Inc.* 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910 (93-2971, 1995).

The failure of Lakeland's safety program is demonstrated in this case, where, Noth, though aware of the applicable work rule, chose to ignore it because he was in a hurry to locate the sewer pipe before Krueger hit it with the back hoe bucket. Krueger, a part owner of the company, not only failed to order a ladder be placed in the trench, but continued to work, digging out the bottom of the trench, *i.e.*, removing what protective sloping existed at the bottom of the trench in the area where Noth was standing. Krueger deliberately ignored the violation and the safety of his employee. It is well settled that misconduct by a supervisor constitutes strong evidence that safety program is lax. *Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991). Where, as here, the supervisor is also a part owner of the company, his misconduct is dispositive. *See also, Gem Industrial, Inc.* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996) [Unanimity of noncomplying conduct by all employees suggests ineffective enforcement].

Lakeland failed to make out the affirmative defense of employee misconduct.

Penalty

A penalty of \$1,200.00 was proposed for this item. The penalty is supported by the evidence.

Alleged Violation of §1926.652(a)(1)

Willful citation 2, item 1 alleges:

29 CFR 1926.652(a)(1): Each employee in an excavation was not protected from cave-ins by an adequate protective system designed in accordance with 29 CFR 1926.652(c). The employer had not complied with the provisions of 29 CFR 1926.652(b)(1)(i) in that the excavation was sloped at an angle steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal):

Employee working in an excavation was not protected from cave-ins.

The cited standard 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 . . .

Facts

CO Greenwood testified that at the time he arrived at the work site, the west wall was vertical at the bottom of the excavation; the other three walls were “quite steep” (Tr. 39). Soil was running down the north wall into the excavation as Noth climbed out and the operator continued to work (Tr. 44, 113; Exh. C-1). While Greenwood watched, the backhoe operator, Krueger (Tr. 256), continued to dig out the sides of the excavation and fill in the bottom of the excavation so that a trench box could be placed in the hole (Tr. 44, 114; Exh. C-1). The backhoe operator excavated an additional five feet from the west side, as well as some soil from the north end of the excavation while Greenwood watched (Tr. 44, 57-58, 112). He added between six and seven feet of soil to the bottom of the trench (Tr. 47). By the time Greenwood was able to take measurements, the excavation was approximately 31.25 feet wide, from east to west, and 39 feet long running north and south (Tr. 55; Exh. C-5). Greenwood was not able to measure the bottom width, but estimated that it was about six feet across (Tr. 56). Water began to seep from the trench walls and accumulate in the bottom of the excavation as Greenwood continued his inspection (Tr. 63, 112; R-3k). Krueger testified that the water was coming out of the sand pipe bedding remaining in the east wall underneath the storm sewer bedding (Tr. 267-68, 284).

Krueger testified that he marked the dimensions of the excavation at 38' x 34' before he began excavating (Tr. 253). Krueger stated that he continued digging out the south end of the trench for approximately 10 to 15 minutes after Greenwood came onto the job site (Tr. 263). Krueger testified that he then moved the back hoe to the west side of the excavation, and continued widening out the bottom of the trench from that side for an additional 15 to 20 minutes (Tr. 264). He denied widening the top portion of the excavation, however, stating that he was only widening out the bottom in order to install Lakeland’s trench box (Tr. 263). Krueger testified that the trench was 34 feet wide and approximately 38 feet long when CO Greenwood arrived on the site (Tr. 270). Gary Taylor testified that when he arrived on the job site, the width of the excavation measured 34 feet; its length, running north and south, was 39 feet (Tr. 203, 207, 230).

According to Taylor and Krueger, the north and south sides of the trench were sloped back one to one, or 45° (Tr. 217, 287). The east and west walls were sloped 3/4 to one (Tr. 287). Taylor was not on the job site at the time of the inspection, but admitted that it appeared from the Secretary’s photographs

that the excavation had been backfilled in the interim (Tr. 231). However, Greenwood, using an engineering rod and a protractor, calculated the slope of the east side of the excavation at 50° (Tr. 45-48; Exh. C-2, pp. 7 through 9, C-5). Using the same method, Greenwood calculated the slope of the north wall of the excavation at 38° (Tr. 53, 59; Exh. C-2, pp. 11 through 14). The slope of the south wall was 48° (Tr. 59; Exh. C-2, pp. 15 through 17).

When deciding to recommend that Lakeland be cited, Greenwood relied on his measurement of the width of the excavation, the known depth of the sanitary sewer, and his estimate of the width of the excavation floor at the time Noth was in the excavation (Tr. 56, 68; Exh. C5). From those dimensions, Greenwood determined that the excavation, if properly sloped, should have been 42 feet wide at the top if the excavation was made in Type B soil, and 60 feet wide at the top if the excavation was dug in Type C soil (Tr. 68-69; Exh. C-5).

From penetrometer readings Greenwood made after scraping the surface from an intact clump of soil from the excavation's spoil pile, he determined that the soil had an average compressive strength of .9 tons per square foot (tsf), and was a Type B soil (Tr. 50-51; Exh. C-10). In addition, Greenwood collected soil samples from the spoil pile, placed them in airtight plastic bags, and sent them to OSHA's Salt Lake Technical Center for analysis (Tr. 70). According to Greenwood, the soil in the spoil pile consisted of two types of material (Tr. 70). One type was a sandy granular material, which was used to backfill those portions of the excavation previously disturbed during the installation of the sanitary sewer, the water pipe and the storm sewer. The other type was a clay-like soil from the undisturbed lower portions of the east and west walls (Tr. 70-72). On August 28, 2002, Krueger signed a written statement affirming that he analyzed the soil in the trench and found it to be Type C (Exh. C-9), though at the hearing Krueger insisted that he was only referring to the pipe bedding (Tr. 284).

Gary Vardon, an analyst at the Salt Lake Technical Center (Tr. 129), testified that the samples from the Lakeland site were analyzed on October 9-10, 2002 (Tr. 133). Vardon testified that he conducted a visual examination of the samples, and a gradation test, in addition to a plasticity test, which he performed on the second sample (Tr. 134). Vardon stated that it is not possible to test the plasticity of Type C granular sand (Tr. 132, 134, 136; Exh. C-8). The first sample consisted of 23.98 % gravel and 19.6% sand and was Type C soil (Tr. 135-36; Exh. C-25). Vardon testified that the second sample had natural plasticity, *i.e.*, would support itself when a 1" diameter ball of soil was rolled into a two inch long strand (Tr. 138). Vardon weighed out a portion of the second sample and did a wet breakdown of that soil (Tr. 134-35). The broken down soil was run through different sized mesh filters to determine the gravel and

sand content of the soil (Tr. 135). Vardon found that the second sample was a cohesive Type B, sandy clay (Tr. 132, 139; Exh. C-8, C-26). The results of four penetrometer tests were averaged, resulting in an average compressive strength of 1.13 tsf, less than the 1.5 tsf required for Type A soil (Tr. 137). Vardon further testified that he noted internal cracks, *i.e.*, fissuring in the sample, indicating fissuring, a feature of Type B soils (Tr. 137; Exh. C-26).

Thomas O'Neill, a soils engineer with STS Consultants (Tr. 160), testified that on August 28, 2002, Gary Taylor, Lakeland's president, brought four soil samples weighing between three to five pounds, to his office for testing (Tr. 162, 164). O'Neill testified that he found that the unconfined compressive strength of the samples ranged between 1.5 tsf and 4.0 tsf, indicating Type A soils (Tr. 163; Exh. R-10). The results conformed to STS's tests on borings samples taken in the general area prior to Lakeland's commencing work on the job (Tr. 167-69), and to a boring sample taken in October 2002 in the adjacent Public Street (Tr. 302, 307-08; Exh. R-4, p. 12). Though Taylor told O'Neill that the samples were from the job site at the Marshfield Industrial Park, O'Neill did not know, with any specificity, where the sample soil came from (Tr. 165, 175). O'Neill did testify, however, that the samples did not contain any previously excavated backfill such as one would find over existing utilities (Tr. 175; 301-02).

O'Neill opined that there is a "potential impact" on soil testing when samples are taken from a spoil pile (Tr. 172). The surface of the soil may begin to dry and may crumble during penetrometer testing (Tr. 173). O'Neill's main objection to the use of soil from a spoil pile was that "you can't assign a depth to the sample" (Tr. 174).

Gary Taylor testified that he took the samples at approximately 2:00 p.m., August 28, 2002, after he was notified of the OSHA inspection (Tr. 202, 204). According to O'Neill, he had Ron Krueger take the samples from the trench walls by cleaning away the exposed soil, and using a shovel to remove a solid chunk of soil from the bank (Tr. 208). While in the trench, Krueger also took penetrometer readings from the cleared banks (Tr. 204-05, 208; Exh. R-3A, R-3B, R-3J through R-3N). According to Taylor, Krueger's penetrometer readings all indicated Type A soils on the east and west slopes (Tr. 209-11, 233; *See also*, testimony of Ron Krueger, Tr. 271). Taylor admitted that the soil between the waterline and the storm sewer, and in the area over the sanitary sewer, had been previously disturbed (Tr. 216-17). However, Taylor stated, though the north and south walls consisted mainly of those previously excavated soils, the east and west sides of Lakeland's excavation ran parallel to the existing utilities, *outside* of any previously excavated areas (Tr. 215-16). Taylor stated that he classified the soil in the north and south

walls of the excavation as Type B (Tr. 233). According to Lakeland, only the trench bedding was Type C soil (Tr. 281).

Discussion

The Secretary and Lakeland premise their arguments on divergent assessments of both the soil classification and the size of the subject excavation. I have reviewed the evidence and considered the testimony of Respondent's principal witnesses, Krueger, Taylor and Gust, and I find the testimony of these witnesses neither credible nor plausible. Lakeland's diagrams of the area show the existing utility lines. Krueger, Taylor and Gust were all aware that the trench would be dug in previously excavated soil. OSHA's videotape shows what was in the plain sight of Krueger and Gust, *i.e.*, a deep trench with steep sides in sandy, apparently unstable soil. The contemporaneous written statement signed by Krueger strongly suggests that he recognized the violation at the time of the inspection. When sophisticated, experienced trenchers with competent person training testify that obviously violative conditions actually were, despite all evidence to the contrary, in compliance with OSHA regulations, it suggests that such testimony has been compromised by the Respondent's post-facto reconstruction of the facts. Such testimony cannot be credited. Accordingly I give no credit or weight to the testimony of these witnesses.

Specifically, as to the soil classification, this judge finds that Complainant's samples most accurately reflect the type of soil at the time of Noth's exposure. Greenwood took penetrometer readings from an undisturbed clump of soil which actually came from the trench. He cleaned off the dried surface soil before taking his readings so that his measurements accurately reflected the soil's compressive strength. Respondent, on the other hand, relies on test results from borings taken outside the area where the trench was located, and on penetrometer readings taken after the trench was groomed by Mr. Krueger, who removed disturbed soil from the trench wall after the cited exposure, but before the readings were taken. Krueger freely admitted that he continued widening and raising the bottom of the trench for half an hour after Greenwood saw Noth in the trench. His contention that he had already removed all the previously disturbed soil from the trench before Greenwood arrived on the site, therefore, cannot be credited, nor can the results of his after the fact penetrometer readings. The results of soil samples collected after Krueger finished cleaning up the excavation, and borings taken outside the area where the previously installed utilities were located are not only irrelevant, but appear calculated to mislead. The first several seconds of Greenwood's videotape show a steep excavation made entirely in loose sandy soil. Krueger identified the previously disturbed in the trench as Type C to Greenwood. None of the hard clay allegedly present in Lakeland's subsequent photographs, and submitted to STS for analysis, is visible.

Lakeland's contention that the sculpted trench walls appearing in Exhibit R-3 are configured similarly, and composed of the same material as the trench walls to which Noth exposed himself in Exh. C-1, is patently false. One need only compare the CO's video to Respondent's after the fact photographs to see the deception. The evidence establishes that the soil composing the walls of the trench at the time it was cited was Type C with pockets of Type B. The videotape shows the west wall and the north slope. Both appear to be Type C soil.

As for the trench dimensions, none of Respondent's slope measurements can be accorded any weight. None of the measurements were made prior to Krueger's grooming of the excavation. What is clear, however, is that, even accepting Lakeland's generous measurements of the top dimensions of the excavation, the trench was not sloped in accordance with OSHA regulations. Lakeland claims that the dimensions of the trench were 34 feet x 38 feet. An excavation 18 feet deep with 6-foot wide bottom³ would have to be a minimum of 42 feet wide to meet OSHA's requirements for Type B soil, *i.e.*, to be sloped to 45°. A trench 18 feet deep in Type C soil must be sloped to 34°. Assuming the bottom of the trench was 6 feet wide, the trench should have been 60 feet wide.⁴ It is clear from the record that the cited trench was in inadequately sloped, and that Noth was exposed to a cave-in hazard. The violation is established.

Willful. The Commission has defined a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶30,759, p. 42,740 (No. 93-239, 1995), *aff'd.*, 73 F.3d 1466 (8th Cir. 1996). Under Commission precedent, the Secretary must differentiate a willful violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Propellex Corporation (Propellex)*, 18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999), *citing*, *Hern Iron Works*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶30,046, p. 41,256-57 (No. 89-433, 1993). In *Propellex*, the Commission noted that the Secretary must show that the employer was actually aware, at the time of the

³ This judge notes that Greenwood's estimate of the width of the trench bottom favors the Respondent. The Secretary's videotape shows Noth working in the trench with a shovel while Krueger continues to widen the trench bottom with a bucket next to him. As Krueger widened the bottom of the trench, the sloping of the walls decreased and the danger of collapse increased.

⁴ The fact that the top width was confined inside the street curbs strongly suggests that economics rather than safety dictated the top width. Had the trench been properly sloped to 60 feet, Respondent would have been required to remove and then replace the curbs.

violative act, that the violative conduct or condition was unlawful, or that it possessed a state of mind such that if it were informed of the unlawful nature of the conduct, it would not care. *Johnson Controls*, 16 BNA OSHC 1048,1051, 1993-95 CCH OSHD ¶30,018, p. 41,142 (No. 90-2179, 1993). The Commission went on to provide examples of an employer's heightened awareness, citing cases where an employer has been previously cited for violations of the standards in question, or has otherwise been made aware of the requirements of the standards, and is on notice that violative conditions exist. *Id.*

Facts

There is no question that Noth entered the trench in plain view of two Lakeland supervisors, James Gust, and Ron Krueger, who was also a part owner of the company. Both Gust and Krueger were trained in trenching safety and completed competent person training provided by Lakeland (Tr. 76, 80, 239-40; Exh. R-11). Lakeland's competent person training covers OSHA regulations and soil classifications, as well as the recognition of trenching hazards, and the means to avoid them (Tr. 198, 240, 255). It is obvious from the videotape that the cited trench did not comply with OSHA's sloping requirements. Mr. Krueger admitted in his written statement that he saw Noth in the trench, and failed to remove him. In his written statement, Krueger implicitly admitted he was aware this constituted a violation, stating that he knew it was no excuse that Noth was only in the trench for a few minutes (Tr. 275; Exh. C-9). Krueger spoke with Noth immediately after Noth exited the trench and told him that he should not have been in the trench without a trench box (Tr. 271-72).

Finally, the record establishes that Lakeland did not use sloping for the protection of employees in excavations, instead relying exclusively on trench boxes. Krueger testified that he planned to use one in this trench (Tr. 257, 259-60, 264, 272, 276). Noth testified that he did not know of any instance when Lakeland used sloping in lieu of a trench box for cave-in protection (Tr. 292, 297).

Greenwood identified OSHA records establishing that Lakeland had been inspected by OSHA seven times, and received six citations since 1990 (Tr. 81; Exh. C-17). Greenwood testified that his records did not reflect instances where OSHA finds the employer in compliance with applicable regulations (Tr. 109-10). The records do show that in 1993, a citation alleging a serious violation of §1926.652(a)(1) was affirmed, and a penalty of \$900.00 assessed (Tr. 81-82; Exh. C-17). In 1994 a serious violation of §1926.651(c)(2) was affirmed, with a penalty of \$625.00 (Exh. C-17). In 1996 OSHA's Appleton office conducted an inspection of a Lakeland excavation following a fatality on its Clover, Wisconsin work site (Tr. 87-88, 222). The fatality involved a Lakeland employee who was found at the bottom of a trench after the end of his work shift, with approximately six inches of soil covering him (Tr. 95-97, 222-24). A

serious violation of §1926.652(a)(1) was cited; the citation was affirmed; and a penalty of \$6,300.00 was assessed (Exh. C-17). In 1997, Lakeland was cited for a repeated violation of §1926.652 (a)(1). The violation was affirmed, and a penalty of \$10,000.00 assessed (Tr. 89; Exh. C-17). Two Lakeland work sites were inspected in 1998. In one, no citations were issued (Exh. C-17). At a Tomah, Wisconsin work site a repeat citation was issued alleging, *inter alia*, a violation of §1926.651(j)(2). A repeat citation was affirmed, and a \$100.00 penalty assessed (Tr. 89, 220; Exh. C-17; C-18). In 2000, Lakeland was cited for serious and repeated violations of §§1926.651(a)(1) and 651(j)(2), respectively, found at a Niagara, Wisconsin work site. The violations were affirmed, and a total penalty of \$10,000.00 was assessed (Tr. 89-90, 93-94, 217; Exh. C-17; C-19).

Discussion

This violation was willful. Two Lakeland supervisors, James Gust, and Ron Krueger, were aware that Noth had entered the trench to dig out the sewer line. The CO's videotape shows a deep, dangerous trench with steep sides, with visibly running soil. It is patently obvious to anyone familiar with trenching that the trench pictured in the CO's videotape was neither safe, nor complied with OSHA sloping requirements. Both Gust and Krueger were trained as competent persons, both have years of trenching experience. Both knew that the area they were excavating had been previously excavated in order to install the existing utilities. The loose soil constituting the trench walls was plainly visible to both. Nonetheless, despite their supervisory roles, and Krueger's part ownership of the company, neither prevented Noth from working in the trench. At worst Gust and Krueger expected or encouraged Noth to enter the trench to protect the pipe from breakage; at best they acquiesced to Noth's presence in the trench. The behavior of Lakeland's supervisory personnel demonstrates both a conscious disregard for OSHA regulations, and a plain indifference to the safety of its employees which is consistent with the lax enforcement of safety rules discussed in the employee misconduct section above.

Given Lakeland's extensive history of OSHA violations, including a trenching related fatality in 1996, this judge finds that Lakeland had a heightened awareness of its responsibilities under the Act, a responsibility which its supervisory personnel willfully ignored in allowing or encouraging Noth to work in the cited trench. Because there is no question that Lakeland had actual knowledge of the conditions, knew that those conditions constituted a violation of the trenching standards, yet acquiesced in the violation, citation 2, item 1 is affirmed as a willful violation of the Act.

Penalty

A penalty of \$49,000 was proposed for this item. The statutory maximum penalty of \$70,000 should be reserved for the most egregious of cases. Here there was no fatality. However, the gravity of the violation was exceedingly high even though one employee was exposed for a short period of time. The trench was deep, the walls were steep, and the back hoe operator continued to excavate the bottom of the trench, increasing the danger to Noth as he worked in the trench. The soil was loose and visibly running. To better appreciate the danger of this trench, which rose approximately 12 feet above Noth's head, one need only consider that the employee found dead at Respondent's Clover work site was covered with only 6 inches of soil. The Secretary's assessment of the gravity-based penalty was appropriate as were her considerations of Respondent's lack of good faith, prior history and size. The proposed penalty of \$49,000 is affirmed.

Other than serious citation 3, item 1 alleges:

29 CFR 1926.200(g)(1): Construction areas were not posted with legible traffic signs at points of hazards:

Traffic signs were not erected.

The cited standard provides:

Construction areas shall be posted with legible traffic signs at points of hazard.

Facts

CO Greenwood testified that Lakeland did not have signage erected to prevent public traffic from approaching the work site (Tr. 99). Lakeland had erected a barrier of traffic cones at the nearest intersection to the south of the excavation (Tr. 304). A "Road Closed" sign was erected after CO Greenwood arrived on the site (Tr. 205; Exh. R-3C). Greenwood testified that the cited violation was classified as "other than serious" because, in his opinion, the absence of barriers did not create a reasonable potential for injury (Tr. 99).

Discussion

In *Wes Construction Corp.*, 4 BNA OSHC 1536, 1976 CCH OSHD ¶20,996 (No. 4106, 1976), the Commission held that §1926.200(g) requires legible traffic signs. The Commission rejected the employer's contention that a parked truck and a uniformed traffic police officer were sufficient to satisfy the requirements of the standard. *Wes Construction Corp.* remains the only Commission case on point, and this judge is constrained to follow it, even though it appears that the traffic cones in place at the nearest intersection protected Lakeland's employees from the hazard addressed by the standard, *i.e.*, being struck by vehicular traffic, *see*, Commissioner Moran's dissent, *Id.*

Citation 3, item 1 is affirmed as an other than serious violation, without penalty.

ORDER

1. Serious citation 1, item 1, alleging violation of 29 C.F.R. §1926.652(c)(2) is AFFIRMED, and a penalty of \$1,200.00 is ASSESSED.
2. Willful citation 2, item 1, alleging violation of 29 C.F.R. §1926.652(a)(1) is AFFIRMED, and a penalty of \$49,000.00 is ASSESSED.
3. Other than serious citation 3, item 1, alleging violation of 29 C.F.R. §1926.200(g)(1) is AFFIRMED without penalty.

/s/

James H. Barkley

Judge, OSHRC

Dated: July 2, 2003