United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Downrite Engineering Corporation, Respondent.	OSHRC Docket No. **05-0710**

Appearances:

Dane L. Steffenson, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Joseph M. Chanfrau, IV, Esq., General Counsel, Downrite Engineering Corp., Miami, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Downrite Engineering Corporation specializes in sewer construction. On March 22, 2005, two Occupational Safety and Health Administration (OSHA) compliance officers conducted an inspection of one of Downrite's worksites located in Miami, Florida. As a result of their inspection, the Secretary issued two citations to Downrite on April 8, 2005. Downrite contests the citations and proposed penalties.

On August 9, 2005, the undersigned held a hearing in this matter in Miami, Florida. The Secretary withdrew item 1 of citation no. 2 (alleging an "other" violation of § 1926.20(b)(1)) at the beginning of the hearing. Four items remain at issue.

Citation no. 1 alleges three serious violations. Item 1 alleges a violation of § 1926.20(b)(2) for failing to have a designated competent person make frequent and regular inspections of the worksite. Item 2 alleges a violation of § 1926.100(a) for failing to ensure employees were protected from falling objects with protective helmets. Item 3 alleges a violation of § 1926.501(b)(4)(i) for failing to provide fall protection to employees exposed to falls greater than 6 feet.

Item 2 of citation no. 2 alleges an "other" violation of § 1926.21(b)(6)(i) for failing to instruct employees in confined space safety.

Downrite denies it failed to comply with the terms of the cited standards. Prior to the hearing, Downrite moved to dismiss the Secretary's complaint, claiming the compliance officers conducted the inspection without a warrant or the company's consent, in violation of Downrite's constitutional rights guaranteed by the Fourth Amendment. The undersigned held Downrite's motion in abeyance and now denies the motion in this decision.

The parties have filed post-hearing briefs. For the reasons discussed below, the undersigned affirms the four items at issue.

Finding of Facts

The Secretary and Downrite submitted a prehearing statement that includes a list of 22 "facts not in dispute." These facts are summarized as follows:

Downrite employs more than 500 employees. In March 2005, Downrite assigned a crew to install the inverts for a series of manholes at the new Silver Palms Caribe Homes Development in Miami, Florida. Caribe Homes is located near the intersection of S.W. 112 Avenue and S.W. 232 Street.

On March 22, 2005, Machado Zafrilla and Daniel Coello were installing a manhole invert. The man hole was 10 feet deep. The opening to the manhole was 24 inches. The interior diameter was 48 inches. Four 8-inch pipes connected to the manhole. The pipes were part of the new Caribe Homes sewer system. On March 22, the pipes had not yet been connected to the public sewer system.

Coello was working at the top of the manhole and Zafrilla was at the bottom. No guardrail was installed around the manhole, although the employees had parked the company truck close to the manhole. Coello was able to keep people from getting too close to the manhole.

Zafrilla was working in the manhole without a hard hat. Neither Zafrilla nor Coello was wearing fall protection.

Coello used a cement mixer to mix the cement Zafrilla needed. He lowered the cement in a 5-gallon bucket tied to a rope to Zafrilla. Coello also lowered bricks or water in the bucket as needed. Zafrilla stood against the wall and waited as Coello lowered the bucket.

Downrite's designated competent person on the site was Willard Schlehuber. Task foreman Christopher Gunnells was Downrites' highest ranking employee on the site. Gunnells was not the direct supervisor of either Zafrilla or Coello.

On March 22, Gunnells notified Schlehuber by cell phone that OSHA compliance officers were at the site of the manhole and talking to Downrite's employees. Gunnells asked the compliance officers to wait 15 minutes for Schlehuber to arrive. Instead, the compliance officers left the site.

Did OSHA's Inspection Violate Downrite's Fourth Amendment Rights?

Downrite contends OSHA conducted a warrantless search of its worksite without its consent, and thus violated its Fourth Amendment right to privacy. The Secretary argues the compliance officers received consent from the project superintendent and vice-president of the general contractor, as well as from Gunnells. She also argues the manhole was in plain view from a public roadway, so that Downrite had no expectation of privacy for its worksite.

On March 22, 2005, compliance officers Jaime Lopez and Miguel Leorza were driving on a public street when they observed an alleged fall hazard on the Caribe Homes construction site (this alleged hazard did not involve a Downrite employee) (Tr. 24-25). The compliance officers stopped, drove onto the worksite, and met with a Mr. Escandel, Caribe Homes project superintendent, and Mario Aguilar, Caribe Homes vice-president of construction. Escandel and Aguilar consented to an inspection of the site (Tr. 31-32).

Lopez and Leorza inspected the observed fall hazard and started to leave. On their way back to the public road, they noticed Coello standing near an open manhole. They drove over to where Coello was standing and started asking him questions about his work. When asked if anyone was in the manhole, Coello responded yes. Zafrilla emerged from the manhole. The compliance officers held an opening conference with Zafrilla. Both employees speak Spanish as their native language and Lopez spoke to them in Spanish (Tr. 33-36, 68). As the compliance officers spoke with Zafrilla, Gunnells approached and told them he was a task foreman for Downrite. The compliance officers also held an opening conference with Gunnells (Tr. 37, 69).

Consent operates as a waiver of the Fourth Amendment right against unreasonable search and seizure. The standard of consent for administrative searches is less stringent than that for criminal searches. Consent may be given by a foreman or senior employee, and a general contractor can give

consent to an inspection for an entire worksite. *J.L. Foti Construction Co. v. Donovan*, 786 F. 2d 1165 (6th Cir. 1986).

In the instant case, Zafrilla, as lead employee, and Gunnells, as a foreman, both consented to the OSHA inspection. Even if they had not consented, it is undisputed that the general contractor's senior representatives consented to the compliance officers' inspection of the Caribe Homes site. Lopez and Leorza did not violated Downrite's Fourth Amendment rights.

Downrite's motion to dismiss is denied.

Citation No. 1

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

Section 1926.20(b)(2) provides:

> Such [accident prevention] programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The citation alleges that on March 22, 2005, Downrite did not conduct an inspection of its worksite where its employees were potentially exposed to "safety hazards such as, but not limited to, falls into floor openings and struck-by falling objects."

Applicability of the Standard

Section 1926.20(b)(2) applies to construction work. Downrite was engaged in sewer construction on March 22, 2005. The cited standard applies to the cited condition.

Compliance with the Terms of the Standard

The parties stipulated project manager Schlehuber was Downrite's designated competent person on the site. Schlehuber testified that generally he assigns a foreman to make worksite inspections, but at the Caribe Homes site there was no foreman over Zafrilla and Coello (Tr. 102). Schlehuber drove past the site twice on the morning of March 22, but neither time did he make an inspection (Tr. 103-104):

Q. And, you drove by this manhole twice. Did you stop at this manhole?

Schlehuber: Not specifically. On that morning, I believe I was doing a flushing next door. I drove by early in the morning, I don't know, 7:00, 7:30, just as a normal drive-through on that job, not specifically for an inspection of any type; just a drive-through of the whole site.

Q. And then, you drove by again later that morning, but you said you were just driving by. It wasn't for any type of inspection either?

Schlehuber: That's correct.

The Secretary has established Downrite failed to comply with the terms of the standard.[1]

Employee Exposure

Zafrilla and Coello were working at the site. Both of them were exposed to the hazards existing at the site on March 22, 2005.

Employer Knowledge

Schlehuber was the project manager for Downrite on the site. As such, his knowledge is imputed to Downrite. He knew he did not make the required inspection that morning, and he was aware he had not assigned anyone else to make one. The Secretary has established Downrite knew of the violative conduct.

The Secretary has established a violation of § 1926.20(b)(2). She contends the violation was serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violation.

> [T]he Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather [s]he must show that "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH P29,500, p. 39,813 (No. 86-351, 1991)[.]

Flintco, Inc., 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

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[1] The Secretary prosecuted this item under the theory that the designated competent person failed to make the required inspections, and the undersigned decided the item on those grounds. A case could also be made that, even if Schlehuber had inspected the worksite on March 22, Downrite violated § 1926.20(b)(2) because Schlehuber was not qualified to act as a competent person. Schlehuber was aware Zafrilla did not wear a protective helmet while working in the manhole and he knew Coello was not using fall protection. He saw nothing wrong with either of these conditions. This calls into question his ability to recognize hazardous conditions at the worksite.

In the instant case, Downrite failed to inspect the worksite. As will be discussed in the next section, Zafrilla was working at the bottom of the manhole and was not wearing his protective helmet. Coello was at the top of the manhole, lowering a variety of materials and equipment, including bricks. Zafrilla was exposed to the hazard of falling objects. Coello was exposed to the hazard of falling into the hole. Had Downrite inspected the worksite, its supervisory employee would have observed Zafrilla working without his helmet and Coello without fall protection, and could have corrected the violative conditions. The violation was serious.

Item 2: Alleged Serious Violation of § 1926.100(a)

Section 1926.100(a) provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The citation alleges, "On or about 03/22/05, an employee inside a manhole was not wearing a hard hat to be protected against potential falling objects."

Applicability of the Standard

Section 1926.100(a) is a construction standard, applicable to the work being done by Downrite.

Compliance with the Terms of the Standard

Lopez observed Zafrilla working inside the manhole without a protective helmet (Tr. 37-38). Downrite stipulated Zafrilla was not wearing a hard hat.

Downrite contends Zafrilla was not required to wear a protective helmet because he was not in an area where there was "a possible danger of head injury from impact, or from falling or flying objects." Downrite takes this position in the face of overwhelming evidence to the contrary. It is part of the stipulated "facts not in dispute" that Coello lowered cement, bricks, water, and other materials to Zafrilla in a 5-gallon bucket. On a regular basis during Zafrilla's time in the manhole, Coello would lean over the opening and lower various materials to Zafrilla who stood in the milk-bottle shaped manhole. Each time he did so, there was a possibility that an object or objects could fall on Zafrilla. Standing up against the wall while Coello lowered the bucket only protected Zafrilla if nothing went wrong. If, however, Coello had inadvertently tipped the bucket, or overloaded it,

or the rope had gotten snagged, or any of several other common occurrences on a construction site, Zafrilla would be exposed to falling objects.

Downrite cites *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3rd Cir. 1985), in support of its position that there was no possible danger of a head injury from falling objects. In *Adams*, the court of appeals held head protection was necessary where employees were working on the third and fourth levels of a building. The court found, "Materials could have been dropped to the levels below, and thus the danger of injury from impact or falling objects was clearly present."

Downrite claims the danger from falling objects was not "clearly present" in this case because "there were no overhead activities about the manhole" (Downrite's supplemental brief, p. 4; emphasis in original). This claim is puzzling, as is Downrite's reliance on *Adams.* Downrite stipulated there were overhead activities, in the form of Coello periodically lowering the bucket and its contents to Zafrilla. This activity created what the *Adams* court called a "clearly present" danger. *Adams* lends support to the Secretary's position.[2]

The Secretary has established Downrite failed to comply with the terms of § 1926.100(a).

Employee Exposure

The Secretary also established employee exposure. Zafrilla was standing at the bottom of a 10-foot deep hole, with an interior diameter of 48 inches, as Coello dangled bricks, concrete, and other materials over his head.

Employer Knowledge

Downrite knew Zafrilla was not wearing a protective helmet. The company had no work rule requiring employees working inside manholes to wear protective helmets. Project manager Schlehuber testified he had never seen an employee working inside a manhole wear a protective helmet (Tr. 107-108).

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[2] Indeed, the court in *Adams* interprets the coverage of § 1926.100(a) expansively, finding "regressive" any requirement that a compliance officer observe an employee being directly exposed to injury from a falling object. The court advocates "access" rather than exposure to danger as the proper test for finding noncompliance with the standard, and concluded (*Id.):*

> "Therefore, the Commission abused its discretion in requiring proof of actual exposure; the Secretary need only prove that employee have access to an area of potential danger." In the instant case, the Secretary established Zafrilla was exposed to actual danger.

Downrite argues it had neither actual nor constructive knowledge of this item because "industry practice does not prescribe the use of head protection" (Downrite's supplemental brief, p.2). The employer knowledge element of the proof goes to the violative condition, not industry practice. It is understood that the environment inside a manhole is often hot and humid. Yet, an employer is not free to disregard a standard's requirements because other employers also violate the standard.

Downrite contends compliance was not necessary because it knew of no instance where an employee was struck in the head by a falling object while working in a manhole. This is a misunderstanding of the purpose of the Occupational Safety and Health Act of 1970 (Act). The Act seeks to prevent the first accident. "The Act is remedial in nature and 'does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injures from ever occurring.' *Whirlpool Corp. v. Marshall*, 100 S.Ct. 883, 890 (1980)." *Adams*, 766 F. 2d at 811.

The Secretary has established a violation of § 1926.100(a). Depending upon which object struck him, Zafrilla could sustain severe head injuries if any of the materials being lowered to him struck him on the head. The violation is serious.

Item 3: Alleged Serious Violation of § 1926.501(b)(4)(i)

Section 1926.501(b)(4)(i) provides:

> Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

Applicability of the Standard

Section 1926.501(b)(4)(i) applies to the construction work in which Downrite was engaged.

Compliance with Terms of the Standard

Downrite stipulated the manhole was not guarded with a guardrail system and its employees were not using any form of fall protection. Downrite failed to comply with the terms of the standard.

Employee Exposure

Downrite argues the 14-inch raised lip around the manhole prevented employees from falling into it. This argument ignores the fact Coello had to walk to the edge of the hole and lean over it as

he lowered the bucket to Zaprilla. The Secretary has established Coello was exposed to falling through the hole.

Employer Knowledge

Schlehuber drove past the worksite twice the morning of the OSHA inspection. It was obvious there were no guardrails in place. Additionally, it was not Downrite's policy to require its employees to use fall protection when working around manholes.

The Secretary has established a violation of § 1926.501(b)(4)(i). Falling through the manhole could result in fractures, contusions, abrasions, and other serious injuries. The violation was serious.

Citation No. 2

Item 2: Alleged "Other" Violation of § 1926.21(b)(6)(i)

Section 1926.21(b)(6)(i) provides:

> All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

Section 1926.21(b)(6)(ii) provides:

> For the purposes of paragraph (b)(6)(i) of this section, *confined or enclosed space* means any space having a limited means of egress, which is subject to the accumulation of toxic or flammable contaminants or has an oxygen deficient atmosphere. Confined or enclosed spaces include, but are not limited to, storage tanks, process vessels, bins, boilers, ventilation or exhaust ducts, sewers, underground utility vaults, tunnels, pipelines, and open top spaces more than 4 feet in depth such as pits, tubs , vaults, and vessels.

The citation alleges Downrite failed to train its employees "on the recognition of potential hazards associated when entering and working in a confined space. . ."

Applicability of the Standard

Downrite argues § 1926.21(b)(6)(i) does not apply to the manhole at issue because the manhole was part of a new sewer system and was not yet connected to the existing system. Therefore, Downrite argues, the manhole was not "subject to the accumulation of toxic or flammable contaminants or [did not have] an oxygen deficient atmosphere" under § 1926.21(b)(6)(ii).

In *Ed Taylor Construction v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir. 1991), the Court of Appeals for the Eleventh Circuit (which has jurisdiction over Florida) held as a matter of law that § 1926.21(b)(6) applies to "any manhole, 'sanitary' or 'dry,'[3] that is twenty-four feet in depth and four feet in diameter." The fact that the depth of the manhole at issue is less than half the depth of the one in *Ed Taylor* does not remove it from the ambit of the standard. The Commission has held it does not regard depth as the decisive factor in determining whether a space is confined or enclosed. *Active Oil Service, Inc.*, 21 BNA OSHC 1092 (No. 00-0482, 2005). The standard expressly applies to any open top space more than 4 feet in depth.

Section 1926.21(b)(6)(i) applies to the manhole at issue.

Noncompliance with the Terms of the Standard

Downrite failed to instruct Zafrilla and Coello as to the nature of the hazards involved in entering a confined space, the necessary cautions to be taken, and the use of protective and emergency equipment required (Zafrilla deposition, Exh. Joint 1, pp. 10-16; Coello deposition, Exh. Joint 2, pp. 15, 20-21; Tr. 116).

Employee Exposure

Downrite contends it minimized any employee exposure to accumulated contaminants or oxygen deficiency because it pulls several manhole covers off at once, which allows air to circulate. Schlehuber conceded, however, that its employees were not required to wait for any specific time before entering a manhole (Tr. 102-103). Downrite vacuums out the manholes to remove debris prior to its employees entering them, but Schlehuber stated the vacuuming usually takes place the week before employees do the invert work (Tr. 113-114). Zafrilla sometimes used a ventilator when working in a manhole to circulate the air and keep the manhole cool. On the day of the inspection, Zafrilla had given his ventilator to another employee working in a different manhole (Zafrilla deposition, Exh. Joint 1, pp. 12-13).

Zafrilla was exposed to the hazards created by Downrite's failure to train him in confined space safety.

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[3] Similar to conditions here, in *Ed Taylor Const., supra*, 938 F.2d at 1268, (footnote in original): "[t]he sole purpose of the manhole was to give access to the cutoff valve, and the shaft was not connected to any sewer or utility."[1]

[1] "A witness at the hearing before the ALJ testified that this type of manhole was referred to as a 'dry shaft' in the construction industry."

Employer Knowledge

As the employer, Downrite was aware it did not provide training in confined space safety to its employees.

The fact that the manhole had not yet been connected to the sewer system lessens the potential harm from this failure to train on confined spaces. The violation is properly classified as an "other" violation. The Secretary has established a violation of § 1926.21(b)(6)(i).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Downrite employs more than 500 employees. OSHA had inspected a Downrite worksite within the previous 3 years. No evidence of bad faith was adduced.

The gravity of the violation of § 1926.20(b)(2) (item 1) is high. An inspection by a competent person could have alerted Downrite of the several violative conditions occurring at the site. It is determined a penalty of $1,200.00 is appropriate.

The gravity of the violation of § 1926.100(a) is high. Coello repeatedly lowered heavy objects over Zafrilla's head. If one of the objects had fallen, it is likely Zafrilla would have sustained a serious injury. A penalty of $1,600.00 is appropriate.

The gravity of the violation of § 1926.501(b)(4)(i) is moderate. While the possibility existed that Coello could fall into the manhole, it does not seem likely given his duties. The lip around the manhole would lessen any likelihood he would inadvertently step into the hole. When Coello was required to lower the bucket to Zafrilla, he was in a stationary position and aware of the hole's existence. A penalty of $800.00 is appropriate.

No penalty was recommended or is assessed for the "other" than serious violation of § 1926.21(b)(6)(i).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of citation no. 1, alleging a serious violation of § 1926.20(b)(2), is affirmed and a penalty of $1,200.00 is assessed;
2. Item 2 of citation no. 1, alleging a serious violation of § 1926.100(a), is affirmed and a penalty of $1,600.00 is assessed;
3. Item 3 of citation no. 1, alleging a serious violation of § 1926.501(b)(4)(i), is affirmed and a penalty of $800.00 is assessed.;
4. Item 1 of citation no. 2, alleging an "other" violation of § 1926.20(b)(1), was withdrawn by the Secretary and is vacated; and
5. Item 2 of citation no. 2, alleging an "other" violation of § 1926.21(b)(6)(i), is affirmed and no penalty is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: February 6, 2006