



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

R. WILLIAMS CONSTRUCTION COMPANY,

Respondent.

OSHC DOCKET NO. 03-0533

APPEARANCES:

For the Complainant:

Susan Seletsky, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California

For the Respondent:

Robert D. Peterson, Esq., Rocklin, California

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, R. Williams Construction Company (Williams), at all times relevant to this action maintained a place of business at the Chumash Casino Project, Santa Ynez, California, where it was engaged in sewer construction (Tr. 271). The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Eric K. Ho, Ho Ho Ho Express, Inc., Houston Fruitland, Inc.*, 20 BNA OSHC 1361, 2002 CCH OSHD ¶32,692, (Nos. 98-1645 & 98-1646, 2003), *citing, Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Williams is, therefore, an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 19, 2002, a Williams employee, Jose Aguiniga, was killed in a trench cave-in at Williams' Santa Ynez worksite (Tr. 14). After being notified of the fatality, the Occupational Safety and Health Administration (OSHA) initiated an inspection. As a result of that inspection, Williams was issued

citations alleging violations of the Act. By filing a timely notice of contest Williams brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On January 28-29, 2004, a hearing was held in Santa Barbara, California. The parties have submitted briefs on the citations, as amended, and this matter is ready for disposition.

Facts

On the morning of September 19, 2002, the subject trench ran east/west, was approximately 40-45 feet long, between 10 and 12 feet deep, and had a bottom width of between 3 and 4 feet (Tr. 8-9, 141, 271). Due to the presence of water, which was constantly seeping into the trench, the soil was classified as type C (Tr. 10, 50, 63-64, 113-15, 188). The bottom five feet of the walls were vertical, after which they were sloped back to approximately 45 degrees (Tr. 9). The trench was not sloped to OSHA specifications; Williams relied on shoring for its employees' protection (Tr. 12). The pipe in the west end of the trench had been installed, and all shoring had been removed from that end in preparation for backfilling (Tr. 12, 261, 275). Joseph Goforth, Williams' equipment operator, was using the loader to move spoils from the south side of the trench to the west, or back end, so that they could be used for backfilling (Tr. 54, 58). Rick Dzamba, the excavator operator, was running the excavator at the east, or leading end, extending the trench for the next length of pipe (Tr. 56, 59, 182, 275).

On September 19, 2002, Adan Palomar arrived at the job site at approximately 7:00 a.m. with Williams employee Sergio Lopez (Tr. 72). The two men removed the tools, shovels and a level, from the truck (Tr. 72). Palomar and the deceased, Jose Aguiniga, then donned rubber boots before entering the trench to clean the pumps, which had been running all night (Tr. 73-75, 81-82, 151; *see also*, testimony of J.P. Williams, Tr. 115). Aguiniga and Palomar were generally responsible for cleaning the pumps used for removing the water from the excavation (Tr. 73-75; *see also*, testimony of Goforth, Tr. 51-52, 63; Palomar, Tr. 77, 79; John P. Williams, Tr. 125). The two men would enter the trench; one would pick up the pump and the other would clean the debris out of the bottom (Tr. 53, 149). Though the pumps could be pulled up and cleaned from the top of the trench (Tr. 133), it was the practice to clean out the buckets, or wells, that the pumps sat in (Tr. 180; Exh. R-1). This could only be done from inside the trench (Tr. 180). It was not uncommon for the pumps to be cleaned up to ten times a day (Tr. 53, 79, 177). The planned backfill could not be compacted if there was water in the trench (Tr. 279).

Palomar told Lopez that they were going down to clean the pumps; Lopez did not tell him to stay out of the trench (Tr. 74). Palomar noticed Dzamba running the excavator as they entered the trench

(Tr. 77, 95). Palomar and Aguiniga worked in the trench for about 15 minutes; as they were on their way out the trench collapsed, killing Aguiniga and severely injuring Palomar (Tr. 76-77).

Lopez provided a statement to the general contractor immediately following the accident, in which he stated that “as soon as [he] saw the trench collapse [he] knew that Jose and Adan were in there checking the pumps.” (Tr. 152-53, 163). At the hearing Lopez testified that he did not know, but only guessed that Palomar and Aguiniga were in the trench (Tr. 165-66). Lopez had seen the two men put on their boots, and he saw people inside when he first turned after hearing the trench collapse (Tr. 153-54, 165-66). He assumed the two men were in the trench checking the pumps, as that was their job (Tr. 165-66). Lopez stated that the contradiction between his testimony and his contemporaneous statement was due to his being “in shock” after the accident (Tr. 153-54).

The excavator was operating approximately 25 feet from the area where Palomar and Aguiniga were in the trench when it collapsed (Tr. 55, 182-83). Dzamba, however, testified that he did not see the men in the excavation prior to the cave-in (Tr. 308). According to Dzamba, he was dumping his load to the south and could not see into the trench until the boom swung around to the north (Tr. 307-09). He had an unobstructed view forward while he was actually digging down the trench. (Tr. 307). Dzamba testified that he saw the earth give way in the trench, and saw Jose running (Tr. 183-84). In his statement immediately following the accident, Dzamba wrote that he saw both men running in the trench (Tr. 193). At the hearing Dzamba could not remember seeing Palomar; he testified that he was ‘in shock’ the day he wrote his statement (Tr. 193).

Goforth started work for Williams four days before the trench collapse (Tr. 43, 46). In addition to operating the loader, Goforth occasionally worked in the trench, setting pumps and laying pipes (Tr. 46, 63). Goforth testified that he received no training when he started work (Tr. 45). He was not told what, if any, work rules Williams had (Tr. 45). He did not see a copy of their safety manual (Tr. 45). There was no discussion relating either to safety or to the work to be done at the beginning of the work day on September 19, 2002; according to Goforth “[w]e pretty much all knew what we were supposed to do.” (Tr. 59). Goforth testified that he received his instructions from Rick Dzamba, the excavator operator (Tr. 56-57).

Palomar testified that he worked for Williams for approximately nine months prior to the accident (Tr. 71). He never received any training in trench safety (Tr. 77, 80). Palomar stated that there was no safety meeting on the morning of September 19, 2002 (Tr. 78). No one ever told him not to go into the

trench (Tr. 102). Palomar, a Spanish speaker, did not know who his supervisor was, as he received all his work instructions from Sergio Lopez, who acted as a translator (Tr. 72, 88-89, 98-99, 143).

Lopez testified that Rick Dzamba was his boss (Tr. 167-68). He testified that he knew he should not go into an unshored trench (Tr. 167). He could not remember whether anyone told him that the presence of water in the trench makes it more dangerous (Tr. 171). Lopez believed that J. P. Williams was merely another member of the crew (Tr. 168).

Rick Dzamba testified that J. P. Williams was the boss on the work site (Tr. 178). Dzamba stated that he had been the supervisor on other Williams' job sites, but that at the Santa Ynez site he was only there to operate the excavator (Tr. 178). Dzamba had been through the OSHA manuals with another employer, but had never been trained as a competent person (Tr. 199-200). Williams had not provided him with any formal training or with any written rules on excavation safety (Tr. 175-76). Dzamba testified that employees were instructed to stay out of the trench when there was no shoring in it during informal morning "tailgate" meetings (Tr. 299-300, 310-11). Dzamba specifically recalled looking at the trench on the morning of September 19, 2002 and commenting that the trench looked the best it ever had, and that the crew would have an easy day (Tr. 178, 303, 311). Nonetheless, he knew that the trench was dangerous (Tr. 195). He did not remember any discussion about not going into the trench (Tr. 312-13, 316).

John (J.P.) Williams also testified that he was the supervisor at the Santa Ynez work site, and that he was responsible for employee safety at the site (Tr. 111). He admitted he had never looked at the company safety manual located behind the seat of his truck (Tr. 124). He had not been trained as an OSHA "competent person," or received any training other than on the job (Tr. 123). Prior to the accident he had never looked at the OSHA standards pertaining to trenching, and was unfamiliar with OSHA sloping and benching requirements (Tr. 123, 131). He did not conduct any physical tests on the soil in the cited trench (Tr. 130).

J.P. Williams testified that he had repeatedly told the crew that no one was to go into the trench without shoring (Tr. 258). Although he could not state with any specificity when the rule was imparted to the crew, he testified that, generally, the crew would discuss safety along with the work scheduled for the day while the equipment was warming up in the morning (Tr. 115, 259-60, 266-68). According to Williams they talked about safety "all the time." (Tr. 116, 265). Employees were warned to wear hard hats, and not to go into an open trench without shoring (Tr. 267, 269). Williams stated that he and Rick Dzamba were in charge of checking the trench on the morning of September 19, 2002, but could not remember

what, if any, warnings he provided employees on that day (Tr. 116, 137-39, 262, 270).

Rodney Williams, owner of the company, testified that both he and J.P. Williams were “competent” in the sense that they were able to recognize a dangerous situation and correct it; neither had received OSHA competent person training (Tr. 289, 291). Rodney Williams testified that he did not designate a competent person; “[i]ts whoever is on the job site is paying attention to what’s going on” (Tr. 292).

Alleged Violations of §1926.21(b)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions(s) and the regulations applicable to this work environment to control or eliminate any hazard(s) or other exposure to illness or injury.

- a) The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

The cited standard provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Discussion

To comply with the requirements of §1926.21(b)(2), the employer must instruct employees on how to recognize and avoid hazardous conditions they may encounter on the job, *and* the regulations applicable to those conditions. *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019 (No. 94-200, 1997), *aff'd. without published opinion*, 158 F.3d 583 (5th Cir. 1998). The required instructions must advise employees of the hazards associated with each specific work site, the ways to avoid them, and be modeled on the applicable OSHA standards. *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419 (No. 90-1106, 1993).

The evidence establishes that Williams failed to provide any training in trenching hazards to at least two employees who worked in the subject trench, Adan Palomar and Joseph Goforth. OSHA Compliance Officer (CO) Daniel Mooney, testified that Kevin Peterson, an excavator operator with Williams, told him that he had received no training in trenching hazards (Tr. 206-07). Williams did not provide training for either Rick Dzamba or J. P. Williams though both acted in a supervisory capacity. This judge can only conclude that Williams’ safety training was next to non-existent, consisting solely of toolbox talks focused mainly on the work to be accomplished that day. The sporadic inclusion of bare instructions not to enter

the trench without shoring or to wear hard hats is clearly inadequate to meet the requirements of the cited standard, especially in this case, where one of the subject employees was a non-English speaker. Finally, the record shows that Williams' supervisory personnel were unfamiliar with OSHA regulations and were, therefore, incapable of instructing employees in their requirements. The Secretary has established the violation.

Penalty

In determining an appropriate penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The factors making up the gravity of the violation include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981)

Without adequate training in trenching hazards, employees are likely to expose themselves to potential cave-in hazards, as they did in this instance. None of Williams' employees received formal training in trench safety. As a result, in plain view of their co-workers, two employees entered a dangerous unshored trench. They worked there for 15 minutes before the trench collapsed around them, killing one and severely injuring the other (Tr. 76-77; 209). The violation is correctly classified as serious and of high gravity. However, Respondent is a small employer, with no history of prior injuries or OSHA violations (Tr. 230-31, 292). The record shows that Williams had been using a shoring system to protect employees prior to the day of the accident. Taking into account the relevant factors, a penalty of \$5,000.00 is deemed appropriate and will be assessed.

Serious citation 1, item 2 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) At the Chumash Casino Project near the north side, there was no stairway, ladder, ramp or other safe means of egress in a trench that was 69-feet long with an average depth of about 10-feet so as to require no more than 25-feet of lateral travel for employees, exposing employees to the hazards of a cave-in.

The cited standard provides:

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

Discussion

_____ In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: 1) the cited standard applies; 2) there was a failure to comply with the cited standard; 3) employees had access to the violative condition; and 4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 1991-93 CCH OSHD ¶29,239 (No. 87-1359, 1991).

_____ It is undisputed that there was no ladder in the 40-45 foot long trench on September 19, 2002 (Tr. 211). Respondent does not dispute that the exposed employees walked into the trench to clean the pipes via the eastern ramp. The wells in which the pumps were located were at the far western end of the trench (Exh. R-1). Clearly there were no means of egress within 25 feet of lateral travel, as required by the cited standard. Respondent argues only that it had neither actual, nor constructive knowledge of the violation, because it could not have known that employees would go into the trench on the day of the accident.

I find Respondent's assertion to be contrary to the weight of the evidence. Respondent's evidence consists of testimony by Rick Dzamba and Sergio Lopez which appeared rehearsed, and was both implausible and inconsistent with prior statements and the testimony of other witnesses. In addition, I find Dzamba's and Lopez' testimony unbelievable based on their demeanor on the witness stand.

Dzamba's testified that he did not see Palomar or Aguiniga in the trench. I find his testimony implausible. Palomar stated that he and Aguiniga were working for 15 minutes cleaning out pumps which were only 25 feet in front of the excavator. Palomar's testimony is reasonable in light of his responsibilities on this project, which required him to keep the pumps running so that water would not accumulate in the trench. After being unattended overnight, the pumps would require cleaning. The record establishes that built up water had to be removed from the trench before Goforth could backfill the trench and work could continue. Dzamba's assertion that he did not see either man in the trench, is not reasonable. The men passed the excavator on the ramp as they entered the trench. Dzamba admitted having a clear view into the trench when he was digging. It is unbelievable that he would not have seen them working 25 feet directly in front of him. Moreover, while testifying, Dzamba behaved as a witness who knew his story was not credible but knew, further, that no one could force him to admit that he saw Palomar and Aquiniga in

the trench. His testimony appeared rehearsed and in too close of harmony with that of Lopez. Both the substance of his testimony and his demeanor cause me not to find him a credible witness. I find that Dzamba actually knew that Palomar and Aguiniga were in the trench on the day of the cave-in.

Finally, this judge finds that Rick Dzamba acted as a supervisor on this job, and that his knowledge of the violation should be imputed to Williams. An employee who has been delegated authority over other employees is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Secretary of Labor v. Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Docket Nos. 86-360 & 86-469, 1992). Though Dzamba denied acting as supervisor on this particular job, it is clear from the testimony that he had been delegated supervisory authority. He was clearly the most experienced member of this crew. He admitted that he had worked as a supervisor for Williams prior to this job. Both Lopez and Goforth took their orders from him. Significantly, Lopez, who had worked for Williams for nine months, believed that J. P. Williams, the owner's younger brother, was just another member of the crew, with no special standing. J. P. Williams appeared uncomfortable when testifying that he was solely in charge of the job, after testifying that he *and* Dzamba were responsible for inspecting the trench on the morning of September 19, 2002. It is telling that only Dzamba had any memory of the results of that inspection. Inspecting the trench for hazards is not normally within the purview of a non-supervisor. The Secretary has shown employer knowledge, and established the violation.

Should these findings be challenged, this judge notes that the Secretary also established Williams' constructive knowledge of the violation. Constructive knowledge may be shown where the employer failed to act with reasonable diligence to prevent the occurrence of violations. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). Reasonable diligence includes the adequate supervision of employees and the formulation and implementation of training programs and work rules designed to ensure that employees perform their work safely. *See; Mosser Construction Co.*, 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991); *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1991-93 CCH OSHD ¶29,344 (No. 86-1087, 1991).

As noted above, Williams had no formal training program. Training was accomplished, if at all, through on-the-job training and morning toolbox meetings in which the day's work was discussed. The circumstances surrounding the accident in this case demonstrate the ineffectiveness of such training. Though ostensibly told not to enter an unshored trench, the two employees, Palomar and Aguiniga, announced to a third laborer, Lopez, that they were going into the obviously unshored excavation. They

walked directly past Dzamba, the excavator operator, and finished cleaning out the pumps while Dzamba continued to dig out the trench with a clear view of them. Neither Lopez nor Dzamba warned Palomar and Aguiniga, or prevented them from entering the trench.¹ It is well settled that unanimity of noncomplying conduct by all employees suggests an ineffective safety program. *See, Gem Industrial, Inc.* 17 BNA OSHC 1861, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). Because Williams failed to take reasonable measures to train its personnel, it cannot excuse the occurrence of safety violations by pleading ignorance.

Penalty

Dzamba saw the cave-in victims running in the trench. Had a ladder been immediately available, one or both of the employees might have been able to escape the trench before being buried. The violation is correctly classified as serious. Taking into account the criteria discussed in the penalty section of item 1, I find that a penalty of \$5,000.00 is appropriate and should be assessed.

Serious citation 1, item 3 alleges:

29 CFR 1926.651(k)(1): An inspection of the excavations, the adjacent areas, and protective systems was not conducted by the competent person prior to the start of work and as needed throughout the shift:

- a) Near the north side of the site, the competent person failed to inspect the excavation and protective systems prior to the start of work and as needed throughout the shift, exposing employees to the hazards of a cave-in.

Or in the alternative, near the north side of the site, the person that conducted the inspection of the excavation and protective systems prior to the start of work and as needed throughout the shift was not a competent person as defined in 29 CFR 1926.650(b), exposing employees to the hazards of a cave-in.

The cited standard provides:

Daily inspections of excavations, the adjacent areas and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

¹ Lopez' testimony that he did not know Palomar and Aguiniga were in the trench is unbelievable. This judge give no credence to his testimony at the hearing, adopting instead the statement he provided immediately after the hearing, in which he stated that he knew the two men were in the trench.

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. 29 CFR §1926.650(b).

Discussion

Neither Dzamba nor J. P. Williams, the supervisory personnel who inspected the cited trench on the morning of September 19, 2002, had received “OSHA competent person” training. Though such training is not specifically required, J. P. Williams was completely unfamiliar with OSHA soil classification and protective systems, and Dzamba permitted two employees to work in an excavation in which they were exposed to safety and health hazards that clearly violated OSHA standards. In doing so, he demonstrated that he was not competent, *i.e.*, not capable, for whatever reason, of identifying and correcting existing and predictable hazards in their surroundings. *E. L. Davis Contracting Co.*, 16 BNA OSHC 2046, 1994 CCH OSHD ¶30,580 (No. 92-35, 1994).

Penalty

The cited violation is correctly classified as serious, as it contributed to the serious injury of one employee and the death of another. For the reasons discussed fully above, a penalty of \$5,000.00 is deemed appropriate and will be assessed.

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).

- a) Near the north side of the site, each employee was not protected from a cave-in 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), exposing employees to the hazard of a cave-in. Generally, the excavation’s depth was about ten feet. From the bottom, the excavation’s average slope was nearly vertical (about 90 degrees measured from the horizontal) for about five-feet and then sloped at about one-horizontal to one-vertical (about 45 degrees measured from the horizontal).

Discussion

The allegations in this citation are not disputed. Respondent argues only that it could not have known that employees would enter the cited trench. For the reasons discussed in citation 1, item 2 above, this judge finds that Williams should have foreseen that without proper training and supervision its employees might endanger themselves to carry out pre-existing assignments. Moreover, this judge finds that Dzamba actually knew that employees entered the trench, while acting in a supervisory capacity. This item has been 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, it is not enough for the Secretary to show that an employer was aware of the conduct or conditions that constitute the alleged violation; such evidence is already necessary to establish any violation. 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).

As discussed fully above, it is clear from the record that the Respondent had reason to know that its employees could be expected to enter the cited trench on the day of the cave-in. In addition, the evidence establishes that Williams had actual knowledge that two employees entered the trench that morning. However, this judge cannot say that this Respondent had a heightened awareness of the illegality of its actions. Rather the record depicts an employer who generally provided protection for its employees in the form of trench shields. The evidence establishes that two employees entered the trench on September 19, 2002 after the shields were removed to extend and backfill the trench. It is clear both that their behavior was predictable and that it could have been prevented with a safety program including adequate safety training and effective supervision. While Dzamba’s knowledge of the victims’ presence in the trench is imputed to Williams for the purpose of establishing knowledge, this judge cannot find, by a preponderance of the evidence, that the Respondent’s knowledge was sufficiently heightened as to reach

the level required for a finding of willfulness. Accordingly the violation will be affirmed as a serious violation of the Act as alleged in the Secretary's complaint, in the alternative.

Penalty

Because the failure to shore the cited trench proximately caused the death of one Williams employee and severely injured a second, the statutory maximum penalty of \$7,000.00 is assessed for this violation.

Other than serious citation 3, item 1 alleges:

29 CFR 1926.651(j)(1): Adequate protection was not provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face:

- a) Near the north side of Chumash Casino Project, adequate protection was not provided to protect employees from loose rocks or soil that fell and rolled from the excavation face, exposing employees to the hazards of being struck by the rocks and soil.

The cited standard provides:

Adequate protection shall be provided to protect employees from loose 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.

Both Palomar and Goforth testified that they were in the trench when there was no plywood between the hydraulic jacks. (Tr. 47, 65, 87). Palomar testified that soil from the trench walls routinely fell into the trench. (Tr. 83, 90-93; *but see* Tr. 256, 261, 302). As this judge credits the testimony of Mr. Palomar, the violation is affirmed without penalty.

ORDER

1. Serious citation 1, item 1, alleging violation of 29 CFR 1926.21(b)(2) is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of 29 CFR 1926.651(c)(2) is AFFIRMED, and a penalty of \$ 5,000.00 is ASSESSED.
3. Serious citation 1, item 3, alleging violation of 29 CFR 1926.651(k)(1) is AFFIRMED, and a penalty of \$ 5,000.00 is ASSESSED.

4. Citation 1, item 1, alleging violation of 29 CFR 1926.652(a)(1) is AFFIRMED as a serious violation, and a penalty of \$ 7,000.00 is ASSESSED.
5. Other than serious citation 1, item 1, alleging violation of 29 CFR 1926.651(j)(1) is AFFIRMED without penalty.

_____/s/_____
James H. Barkley
Judge, OSHRC

Dated: May 24, 2004