UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.

BLANKENSHIP & LEE PIPELINE CO., INC
Respondent.

OSHRC DOCKET
NO. 93-0377

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 10, 1994. The decision of the Judge will become a final order of the Commission on April 11, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 30, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 10, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0377

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William H. Berger
Deputy Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 339
1371 Peachtree Street, N.E.
Atlanta, GA 30309

Carl R. Pennington, Jr., Esquire
Pennington, Haben, Wilkinson,
Culpepper, Dunlapm Richmond &
French, P. A.
Post Office Box 10095
Tallahassee, FL 32302 2095

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

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

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

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

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-377
BLANKENSHIP & LEE, INC.,	:	
Respondent.	:	

APPEARANCES:

Leslie J. Rodriguez, Esquire
U. S. Department of Labor
Office of the Solicitor
Atlanta, Georgia
For Complainant

Carl R. Pennington, Jr., Esquire
Pennington, Haben, Wilkinson, Culpepper,
Dunlap, Richmond & French, P.A.
Tallahassee, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Blankenship & Lee, Inc. (B & L), is an underground utility contractor. During the November 4, 1992, inspection by Occupational Safety and Health Administration (OSHA) Compliance Officer David Hubert, B & L was reconstructing the sanitary sewer lines for a new pumping station for the City of Pelham, Georgia (Tr. 13). On January 13, 1993, the Secretary issued two citations to B & L: alleged serious violations of trenching-related standards and a nonserious violation of the hazard communications requirements. Specifically, the serious citation alleged violations of § 1926.651(c)(2), for failure to provide a safe means of egress from a trench; § 1926.651(j)(2), for failure to keep excavated

material further than 2 feet from the trench; § 1926.100(a), for failure to enforce wearing of hard hats while in the trench; § 1926.651(k)(1), for failure to have the trench inspected by a competent person; and § 1926.652(a)(1), for failure to have an adequate protective system as required by the standard.

B & L primarily asserts that any violation was the result of unanticipated circumstances and employee misconduct.

COVERAGE

B & L is incorporated in the State of Florida and does business in that state and in Alabama and Georgia (Tr. 12). The contract for the work in Pelham was bid from the company's Alabama office. B & L's employees, some of whom lived in Florida, regularly traveled across state lines while performing the work in Pelham, Georgia. B & L used equipment which was manufactured in Illinois and other states in the Midwest (Tr. 13-14, 29-30). An employer is covered by the Occupational Safety and Health Act of 1970 (Act) if it is engaged in a business affecting commerce. *Val-Pak, Inc.*, 11 BNA OSHC 2094, 1984 CCH OSHD ¶ 26,974 (No. 79-1569, 1984). B & L's business activities affected commerce, and it is covered by the Act.

DIMENSIONS OF THE EXCAVATION

The trench was cut with a 28- to 32- inch bucket. The employees and Hubert agreed that the bottom width of the trench was 28 to 32 inches (Tr. 65, 127). Hubert measured the top width as 36 inches. The trench walls were vertical without sloping or shoring (Tr. 104). The parties dispute the height of the trench, which is critical to the case. Since actual measurements were taken, it is unnecessary to rely on hearsay testimony comparing the height of an exposed employee to the height of the trench. While superintendent James Lines watched, Hubert used a steel tape to measure the depth of the trench at the point where he observed the employee had been working. That measurement was 6 feet. Approximately 40 feet north from the first measurement, where the trench appeared shallowest to Hubert, he measured 5 feet 4 inches (Tr. 95, 104, 126). The spoil pile was placed on the west side of the trench. Hubert measured the east side from the bottom of

the trench to the point where "the soil started bending back" (Tr. 114-115). Hubert noted that on the east side there was "a little bit of [soil] spillage" (Tr. 126). After the compliance officer left, Lines also measured the trench. To do this, he "cleaned the dirt off the top of the ditch" to get the "true measurement" at the place along the trench wall where the grass line showed. Lines measured this portion of the trench as 4 feet 11 inches. (Exh. C-3; Tr. 139). Lines' approach was not an acceptable method for measuring a trench wall. The employee was *exposed* to a possible cave-in of a 6-foot trench wall. Hubert had not measured the side of the trench where the spoil pile was placed. He correctly included in the trench wall measurement incidental soil deposited as the excavation was dug. The depth of the trench at the two locations was shown to be 6 feet and 5 feet 4 inches, respectively.

CITATION NO. 1

Item 1: Alleged Violation of § 1926.651(c)(2)

The Secretary charges a violation of § 1926.651(c)(2), for failure to have a safe means of egress. The standard requires:

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

The terms of the standard apply since at the time of the inspection the trench was a minimum of 5 feet 4 inches deep and had been opened up for the length of 100 feet (Tr. 95, 99). There was no stairway or ladder in the trench. When Hubert requested the exposed employee, Jackie Rutherford, to exit the trench, Rutherford climbed onto the sewer pipe and walked 70 feet down to the north end of the open trench where it was being backfilled (Exh. C-2; Tr. 38, 93). B & L argues that rather than walking 70 feet to the rear of the trench, the employee could have exited on the "ramp" which was created at the south end as the John Deere backhoe dug the trench. The distance to the backhoe was less than 25 feet (Tr. 68). B & L misses the point. The standard requires that there be a quick and safe means of egress from a trench. B & L did not show that the excavator created anything like an exit ramp on November 4, 1992. Even if a slope was coincidentally constructed while the trench

ramp on November 4, 1992. Even if a slope was coincidentally constructed while the trench was being excavated, this was not a "ramp" or a "safe means of egress" for purposes of the standard (See § 1926.651(c)(1)). Practically speaking, Rutherford had the alternative of walking, as he did, 70 feet and exiting at the rear of the trench or walking into the operating backhoe and risk being crushed by it. Alternately, B & L suggests that Rutherford could exit the trench by stepping onto the pipe and hoisting himself out of the trench (Tr. 79). Using rounded sewer pipe as a boost out of a trench which is higher than 4 feet is unacceptable. B & L did nothing to provide safe egress for its employee. Its argument that no means of egress was required is contrary to the standard.

B & L had constructive knowledge of the violation "which [was] readily apparent to anyone who looked." *Simplex Time Recorder Co.*, 766 F.2d 575, 589 (D.C. Cir. 1985). Further, his superintendent knew the violation existed, and his knowledge is imputed to B & L. *Dover Elevator Co.*, 15 BNA OSHC 1378, 1991 CCH OSHD ¶ 29,524, p. 39,849 (No. 88-2642, 1991). Failure to have a quick and safe means of egress from a trench compounds the dangers of a cave-in and could result in serious bodily harm or death.

The violation is affirmed as serious.

PENALTY

B & L employed between forty to fifty employees in November 1992 (Tr. 28). One employee was exposed to the hazard "all day" (Tr. 38). There was no showing of previous serious violations (Tr. 143). Respondent had a formal safety program, and its employees attended weekly safety meetings. It is recognized that B & L made some significant efforts toward educating its employees on the trenching standards. It sent 14 employees for training to become competent persons. Its co-owner, William Lee, is a certified OSHA instructor (Tr. 140, 141, 172). The Act requires "due consideration" be given to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). Considering these factors, a penalty of $1,000 is assessed.

Item 2a: Alleged Violation of § 1926.651(j)(2)

The Secretary alleges that B & L violated § 1926.651(j)(2) by storing the spoil pile at the edge of the trench. B & L argues that since there was no other place to store the excavated material, it was impossible to comply with the standard. The standard requires:

> (j) *Protection of employees from loose rock or soil.* (2) Employees shall be protected from excavated or other materials or equipment that could pose a hazard by . . . placing and keeping such materials or equipment at least 2 feet from the edge of excavations . . ., or by the use of retaining devices that are sufficient to prevent materials . . . from falling or rolling into the excavations

The facts establish the violation. Hubert observed the spoil pile stored at the edge of the west side of the excavation (Exh. C-5; Tr. 94, 102). The backhoe operator, Calvin Scott, admitted the spoil was no more than 6 to 8 inches from the edge (Tr. 66). The spoil pile was loose and dry (Tr. 49, 95). The spoil was placed near the trench edge because pipes had been stored perpendicular to the street, taking up more room than if they had been laid parallel to the street (Tr. 75, 97).

B & L asserts that the Secretary has the burden of proving that the spoil pile posed a hazard of falling or rolling into the excavation (Respondent's Brief, pg. 4). The standard presupposes the hazard, and it is sufficient for the Secretary to prove that the terms of the standard were not met. *See Wright & Lopez*, 10 BNA OSHC 1108, 1981 CCH OSHD ¶ 25,728 (No. 76-256, 1981). Further, when a standard specifies a method of complying, an employer seeking to be excused from compliance has the burden of demonstrating that the standard is infeasible under the circumstances. *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1956-59, 1986-87 CCH OSHD ¶ 27,650, pp. 36,024-27 (No. 79-2553, 1986), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988); *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161, 1993 CCH OSHD ¶ 30,042 (Nos. 90-1620 & 90-2894, 1993). B & L's infeasibility defense fails not only because abatement was physically possible if the pipes were repositioned, but B & L did not use alternative protective measures which were available. *See Seibel Modern Mfg. & Welding Co.*, 15 BNA OSHC 1218, 1227, 1991 CCH OSHD ¶ 29,442, p. 39,683 (No. 88-821, 1991).

Lines was aware of the location of the spoil pile, and his knowledge is imputed to the company. The violation is serious because a falling spoil pile in the narrow trench could result in serious bodily harm.

A serious violation is affirmed.

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

The Secretary asserts that B & L violated § 1926.100(a) because Rutherford was not wearing a hard hat while he was in the trench. B & L admits that Rutherford did not wear protective head gear. The standard specifies that:

> Employees working in areas where there is a possible danger of head injury . . . shall be protected by protective helmets.

Rutherford was required to stoop over when he disconnected the pipe harness and when he cleaned the newly lowered pipe (Tr. 60). He was subject to the danger of head injury while performing his work in the trench. Rutherford had been observed throughout the day by superintendent Lines, and his knowledge is imputed to B & L (Tr. 38). The violation is serious because Rutherford was in danger of being hit, by equipment or materials as pipe was lowered, or by falling soil from the spoil pile or a cave-in.

The serious violation is affirmed.

PENALTY

Considering the statutory factors previously discussed and the moderate gravity of the grouped violations, a penalty of $1,000 is assessed for items 2a and 2b.

Item 3: Alleged Violation of § 1926.651(k)(1)

The Secretary alleges that B & L violated § 1926.651(k)(1) because the trench was not inspected by a competent person as required by the standard. The standard provides:

> Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person.

The excavation standards in §1926.650(b) define "competent person" as:

> [O]ne 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.

Two of the three employees at this trench, foreman Lines and heavy equipment operator Scott, received competent person training from the National Utility Contractors Association (Tr. 102). These were two of the fourteen B & L employees who took the competent person training (Tr. 147). Although Lines and Scott may have received "competent person" instruction, they did not perform the necessary tests and make the decisions appropriate to those given the classification.

Subpart P, Appendix A(c)(2), requires the competent person to classify soil as either stable rock, Type A, Type B, or Type C soil. This classification must be "based on at least one visual and at least one manual analysis." At the time of the inspection, Lines told Hubert that he had not made a manual test of the soil (Tr. 103, 128). Lines testified that he performed a "visual test" of the soil, noting:

Q. Did you pick up the soil and do anything with it before OSHA arrived?

A. No. I do every day, a visual check. (Tr. 50).

Later in his testimony, Lines seemed to recall that he may have squeezed the soil to check for firmness and water. His recollection was based on the fact that this was something he usually did. Lines did not know if he actually performed the test on the day of the inspection (Tr. 59-60). Lines' memory would have been freshest when he admitted to Hubert that he performed no manual tests. It is thus concluded that Lines failed to make the required manual soil test. Lines was also incorrect as to the proper method for measuring a trench. Since the standards specify different requirements predicated upon different trench depths, a competent person must be able to measure those dimensions accurately. Failure to have a competent person conduct the tests necessary to classify the soil may result in a cave-in from improperly protected trenches.

The violation is affirmed as serious.

PENALTY

Considering the factors previously discussed and the gravity of failing to conduct appropriate tests, which is moderate in the circumstances, a penalty of $500 is assessed.

Item 4: Alleged Violation of § 1926.652(a)(1)

A violation of § 1926.652(a)(1) is asserted because B & L did not shore, slope or use alternate methods for protecting its employees in the excavation. The standard requires:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet in depth . . . .

As stated, the trench ranged in depth from 5 foot 4 inches to 6 feet. The standard required that some protective system be used unless the trench was dug in solid rock. It was not. Hubert related that he picked up chunks of soil and pulverized them in his hand as Lines watched. Lines told Hubert that the soil was a sandy clay. Hubert classified the soil as Type C based on the ease with which the soil crumbled in his hand (Tr. 95). Lines, on the other hand, recalled that he would have classified the soil as between A and B (Tr. 57). Regardless, B & L should have sloped the trench or employed some other protective method. B & L's superintendent was on site, and his knowledge of the violation is imputed to the company. Failure to properly slope or shore a trench can result in cave-ins causing serious bodily injury or death. The violation is serious. In determining the appropriate penalty, the factors previously discussed were considered together with the gravity of the violation, which was high. The penalty was mitigated by the efforts made by respondent since 1980 to create a safe workplace. A penalty of $1,000 is assessed.

B & L'S EMPLOYEE MISCONDUCT DEFENSE

Before reaching the decision that B & L violated each of the alleged excavation standards, its employee misconduct defense was carefully considered. The Commission has long recognized that an employer is not required to take into account the idiosyncratic

Co. v. OSHRC, 489 F.2d 1257, 1266 (D.C. Cir. 1973). It is not sufficient to meet the defense, however, that an employer "takes safety seriously." In order to establish an affirmative defense on grounds of employee misconduct, the employer must show that: (1) it established work rules designed to prevent the violative conditions from occurring; (2) the work rules were adequately communicated to its employees; and (3) it took steps to discover violations of those rules, and effectively enforced the rules when violations were discovered. *E.g., Gary Concrete Products, Inc.*, 15 BNA OSHC 1051, 1056, 1991 CCH OSHD ¶ 29,344, p. 39,452 (No. 86-1087, 1991); *H. B. Zachry Co.*, 7 BNA OSHC 2202, 1981 CCH OSHD ¶ 25,223 (No. 80-1357, 1981), *aff'd*, 638 F.2d 812 (5th Cir. 1981). The burden of proving the defense rests with the employer asserting it. *S & H Riggers & Erectors, Inc.*, 7 BNA OSHC 1260, 1979 CCH OSHD ¶ 23,480 (No. 15855, 1979), *rev'd*, 659 F.2d 1273 (5th Cir. 1981).

The company's work rules must be specific as to the hazard in order that employees know exactly what conduct is prohibited. B & L required employees to wear hard hats in all "construction areas." (Exh. R-2, pg. 28). Trenches "in unstable or soft material, 5 feet or more in depth," were to be sloped or otherwise protected (Exh. R-2, pg. 35). Likewise, work rules existed regarding use of ladders in trenches and storing excavated materials 2 feet from the trench edge. Of concern here is the fact that the work rule involving sloping of the trench was based on the earlier standard and addressed only "unstable or soft material." Generally speaking, the work rule must be precise enough to implement the requirements of the standard or be functionally equivalent to it. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1415 n. 4, 1992 CCH OSHD ¶ 29,546, p. 39,906 n. 4 (No. 89-1027, 1991). It is unclear how B & L used the competent person manual (Exh. R-1) which simply recited the new standard. Even if the work rules were arguably specific, however, they were not adequately communicated and enforced. B & L conducted weekly safety meetings, but it was not established that the particular rules were ever communicated to the employees. *Each* of the work rules at issue was ignored by Rutherford, by Scott and, most significantly, by superintendent Lines. For an employee misconduct defense "[proof] is more rigorous and the defense more difficult to establish . . . ." when the employee is a supervisor. *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027 (No. 16265, 1982). As the Commission stated in *Jensen Construction Co.*, 7 BNA OSHC 1477, 1478, 1979 CCH

OSHD ¶ 23,664 (No. 76-1538, 1979), "[m]oreover, the fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax." Finally, B & L did not enforce the work rules when violations were shown. Rutherford was not disciplined for failing to wear his hard hat; Scott, for placing the spoil pile at the trench edge and for failing to slope the trench; or Lines, for failing to take action to correct the violations (Tr. 20, 170). Lines and Scott, both of whom testified at the hearing, may be as Blankenship characterized them, "as good as they come" (Tr. 171). Discipline for safety rule infractions by no means requires termination. However, B & L took no effective disciplinary measures after four of their work rules were violated. B & L has not met its employee misconduct defense.

CITATION NO. 2

Item 1: Alleged Violation of § 1926.59(e)(1)

The Secretary alleges a nonserious violation of § 1926.59(e)(1) because B & L did not keep a hazard communication program at the jobsite. Diesel fuel, hydraulic fluid and gasoline were used by employees in Pelham. B & L admits that its written program was kept at its headquarters and not at the jobsite. The standard provides:

> Employers shall develop, implement, and maintain *at the workplace*, a written hazard communication program . . . . (Emphasis added)

An employer is required to have its program at the actual worksite. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1993 CCH OSHD ¶ 29,597 (No. 91-373, 1993). The violation is "other" than serious since employees were familiar with the hazard communication standard and with the specifics concerning the hazardous substances they worked with (Tr. 106). No penalty is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is ORDERED:

(1) That the violation of § 1926.651(c)(2) is affirmed as serious and a penalty in the amount of $1,000 is assessed.

(2) That violations of § 1926.651(j)(2) and § 1926.100(a) are affirmed as serious and a penalty in the amount of $1,000 is assessed.

(3) That the violation of § 1926.651(k)(1) is affirmed as serious and penalty of $500 is assessed.

(4) That the violation of § 1926.652(a)(1) is affirmed and a penalty of $1,000 is assessed.

(5) That the violation of § 1926.59(e)(1) is affirmed as nonserious with no penalty assessed.

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

Date: March 3, 1994